TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 359.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED FEBRUARY 12, 1909.

(21,515.)

(21,515.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 719.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Original.	Print.
Petition for writ of error	*a*	1
Order allowing writ of error	*d*	2
Clerk's certificate	*e*	3
Writ of error	*f*	3
Citation and service	*i*	4
Bond on writ of error	*k*	5
Stipulation as to bond	*o*	7
Clerk's certificate	*q*	7
Assignment of errors	*r*	8
Clerk's certificate	*&*	12
Transcript from district court of Ramsey county, State of Minnesota.	1	13
Complaint	1	13
Answer	3	14
Amended reply	15	20
Stipulation as to transcript of evidence, &c.	20	23
Settled case	21	23
Offers by defendant	21	23
Defendant's Exhibit 1—Stipulation of facts	30	27
Exhibit A—Diagram	62	43
Exhibit B—Deed between St. P., M. & M. Ry. Co., G. N. Ry. Co., and Central Trust Co. of New York, February 1, 1890	63	44

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 8, 1909.

		Original.	Print.
Defendant's Exhibit	2—Act by the Legislative Assembly of the Territory of Minnesota to execute the trust created by an act of Congress making a grant of land to the Territory, &c., approved May 22, 1857	164	97
	3—Acceptance by M. & P. R. R. Co. of provisions of act of May 22, 1857	191	109
	4—Notice from President of M. & P. R. R. Co. to Governor of Minnesota, June 2, 1858	193	110
	5—Deed from M. & P. R. R. Co. to Farnsworth *et al.*, trustees, July 31, 1858	195	111
	6—Deed from M. & P. R. R. Co. to State of Minnesota, October 25, 1858	223	123
	7—Deed from M. & P. R. R. Co. to State of Minnesota, November 23, 1858	229	126
	8—Deed from M. & P. R. R. Co. to Farnsworth *et al.*, trustees, November 27, 1858	241	133
	9—Foreclosure sale of the lands, properties, and franchises of the M. & P. R. R. Co.	246	135
	10—Deed from M. & P. R. R. Co. to State of Minnesota, October 16, 1860	264	145
	11—An act to facilitate the construction of the M. & P. R. R., approved March 8, 1861	271	149
	12—An act to facilitate the construction of the M. & P. R. R. and to amend and continue the act of incorporation, approved March 10, 1862	275	151
	13—An act to amend the charter of the St. Paul & Pacific R. R. Co., approved February 6, 1864	286	157
	14—Agreement between the St. Paul & Pacific R. R. Co. and E. B. Litchfield, February 6, 1864, &c.	291	159
	15—An act to legalize and confirm the organization, acts, and proceedings of the first division of the St. Paul & Pacific R. R. Co., &c., approved February 6, 1866	306	167
	16—An act to aid and facilitate the completion of the St. Paul & Pacific R. R. and branches, approved March 2, 1865	309	169

	Original.	Print.
Defendant's Exhibit 17—An act in relation to the taxation of lands granted to the St. Paul & Pacific R. R. Co., approved March 4, 1865	315	169
18—Resolutions of board of directors of St. Paul & Pacific R. R. Co., March 14, 1865	316	170
19—Letter of Samuel D. Breed to D. Blakely, April 28, 1865	318	171
20—An act to amend the charter of the St. Paul & Pacific R. R. Co., approved March 2, 1867	319	171
21—An act to authorize the first division of the St. Paul & Pacific R. R. Co. to extend its branch line from St. Cloud via Sauk Centre and Alexandria to the Red River of the North, approved March 6, 1869	320	172
22—An act to authorize the first division of the St. Paul & Pacific R. R. Co. to locate, extend, and construct its main line from its present authorized terminus to the northern boundary of the State of Minnesota, approved February 18, 1870	322	173
23—An act to authorize the first division of the St. Paul & Pacific R. R. Co. to construct a branch from some point on its branch line to Princeton, in the county of Millelacs, approved March 4, 1870	324	174
24—An act to authorize the first division of the St. Paul & Pacific R. R. Co. to construct a branch line from some point in Meeker or Wright counties to the village of Hutchinson, in McLeod county, approved March 3, 1876	326	175
25—An act to amend chapter 201 of the special laws of 1877, entitled "An act to provide for the completion of the lines of railroad commonly known as the "St. Paul & Pacific Extension Lines," approved March 9, 1878	327	175
26—Deed from the St. Paul & Pacific Railroad Company to George L. Becker *et al.*, October 1, 1865	332	178

	Original.	Print.
Defendant's Exhibit 27—Deed from sheriff of Ramsey county, Minnesota, to John S. Barnes, May 10, 1879	370	196
28—Statement of the St. Paul, Minneapolis & Manitoba Railway Company, made, certified, and attested under and pursuant to an act of the legislature of the State of Minnesota, approved March 6, 1876, entitled "An act to amend title 1 of chapter 34 of the general statutes relating to corporations," dated June 11, 1879	378	200
29—Deed of John S. Barnes *et al.* to the St. Paul, Minneapolis & Manitoba Railway Company, June 18, 1879	384	203
30—Deed between first division of the St. Paul & Pacific Railroad Company and George L. Becker *et al.*, July 1, 1868	389	205
31—Deed from sheriff of Hennepin county to the St. Paul, Minneapolis & Manitoba Railway Company, June 12, 1879	428	224
32—Trust deed of St. Paul & Pacific Railroad Company to Horace Thompson *et al.*, April 1, 1871	437	228
33—Deed of Horatio E. Mann, master in chancery, to the St. Paul, Minneapolis & Manitoba Railway Company, June 21, 1879	479	248
34—Record in the district court of Wright county, Minnesota, in the case of The First Division of the St. Paul & Pacific Railroad Company *vs.* Frank M. Parcher, county treasurer, *et al.*	486	252
Complaint	486	252
Demurrer	513	265
Order to show cause	514	265
Order granting temporary injunction	515	266
Temporary injunction order	517	267
Order overruling demurrer	519	268
Notice of appeal	520	268
Mandate	521	269
Notice of remittitur	522	269
Affidavit of no answer	524	270
Notice of application for judgment and order	525	270
Judgment	525	271

	Original.	Print
Defendant's Exhibit 35—Opinion of the supreme court of Minnesota in the case of The First Division of the St. Paul & Pacific Railroad Company *vs.* Frank M. Patcher, county treasurer, *et al*	538	278
36—Record in the matter of proceedings to enforce payment of taxes remaining delinquent on the first Monday of January, 1886, for the county of Stevens, State of Minnesota	542	280
Statement by district court	542	280
Answer	543	280
Stipulation as to answers, etc	554	286
Exhibit A—Agreement of February 15, 1884	555	286
Exhibit B—Proceedings of board of directors, March 14, 1865	560	288
Findings	561	289
Opinion of supreme court	563	290
37—Proceedings in the case of County of Travis *vs.* The St. Paul, Minneapolis & Manitoba Railway Company	565	291
Statement	565	291
Amended answer	566	291
Schedule of lands	578	297
Stipulation of fact	580	298
Exceptions to rulings	594	305
Findings of fact	597	307
Conclusions of law	598	307
Tax judgment	600	308
Stipulation as to record	609	314
Opinion of supreme court	610	314
38—An act to incorporate the Minneapolis & St. Cloud Railroad Company, March 1, 1856	612	315
39—An act to amend an act incorporating the Minneapolis & St. Cloud Railroad Company, etc., February 28, 1865	628	323
40—An act to amend the charter of the Minneapolis & St. Cloud Railroad Company, March 2, 1870	642	329
Judge's certificate to transcript of evidence	644	331
Findings of fact	645	331
Conclusions of law	646	332
Order for judgment	646	332
Memorandum opinion	647	332
Exhibit B—Statement	659	338
Stipulation fixing amount of judgment	667	342
Judgment	668	342

	Original.	Print
Plaintiff's notice of appeal	670	343
Defendant's notice of appeal	671	344
Opinion	672	345
Clerk's certificate to opinion	700	360
Minute entry of argument and submission (No. 27)	702	361
Order for judgment (No. 27)	704	361
Judgment (No. 27)	706	362
Minute entry of argument and submission (No. 28)	707	363
Order for judgment (No. 28)	708	364
Judgment (No. 28)	709	365
Clerk's certificate to transcript of record	710	365

a STATE OF MINNESOTA:

Supreme Court, October Term, 1908.

STATE OF MINNESOTA, Appellant,
v.
GREAT NORTHERN RAILWAY COMPANY, Respondent.

STATE OF MINNESOTA, Cross-Respondent,
v.
GREAT NORTHERN RAILWAY COMPANY, Cross-Appellant.

Petition for Writ of Error.

To the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota:

Now comes the Great Northern Railway Company, respondent and cross-appellant in the above entitled cause, and prays that a writ of error in said cause may issue from the Supreme Court of the United States to the Supreme Court of the State of Minnesota to review a certain judgment entered in said Supreme Court of the State of Minnesota on the 21st day of January, 1909, in favor of the said State of Minnesota and against the said Great Northern Railway Company; and said Great Northern Railway Company assigns the following errors in the rendition of said judgment. Said Supreme Court of the State of Minnesota erred:

b 1. In holding that the act of the Legislative Assembly of the Territory of Minnesota of May 22, 1857, as amended by the acts of the Legislature of the State of Minnesota of March 2 and March 4, 1865, did not create a valid and irrepealable contract as to the taxation of the lines of railroad provided for in said act of May 22, 1857, which had been constructed by the Minnesota and Pacific Railroad Company, the St. Paul and Pacific Railroad Company, the First Division of the St. Paul and Pacific Railroad Company and The St. Paul, Minneapolis and Manitoba Railway Company and which are operated by said Great Northern Railway Company under a lease thereof.

2. In holding that said Great Northern Railway Company did not become vested with and entitled to the benefits of said contract as to the taxation of said lines of railway described in the preceding assignment of error as an appurtenant to said lines of railway.

3. In holding that Chapter 253 General Laws of Minnesota for the year 1903 did not impair the obligation of said contract mentioned in the first assignment of error.

4. In holding that said Chapter 253 General Laws of Minnesota for the year 1903 did not deprive said Great Northern Railway Company of a contract right appurtenant to said lines of railway without due process of law.

5. In holding that Chapter 243 General Laws of Minnesota for

the year 1903 was valid and enforceable against said Great Northern Railway Company as applied to the lines of railway described in the first assignment of error, for the reason that said Chapter 253 as construed by the Supreme Court of the State of Minnesota impairs the obligation of the contract with reference to the taxation of said lines of railway, which contract was created by said act of May 22, 1857, as amended by said acts of March 2 and March 4, 1865, and the acceptance of said acts, in violation of Section 10 of Article I of the Constitution of the United States; and for the further reason that said Chapter 253 as construed by said Supreme Court of the State of Minnesota deprives said Great Northern Railway Company of its property without due process of law in that it destroys and takes away from said Great Northern Railway Company without any compensation therefor a right appurtenant to said lines of railway created by said act of May 22, 1857, as amended by said acts of March 2 and March 4, 1865, in violation of Section 1 of Article XIV of the amendments to the Constitution of the United States.

6. In holding that said Chapter 253 General Laws of 1903 was valid and enforceable against said Great Northern Railway Company as to the lines of railway described in the first assignment of error, for the reason that said Chapter 253 as construed by the said Supreme Court of the State of Minnesota impairs the obligation of the contract created by the several mortgages executed by the St. Paul and Pacific Railroad Company and the First Division of the St. Paul and Pacific Railroad Company and the foreclosures of said mortgages and the purchases of the railways, properties, franchises, privileges and immunities of said companies under said foreclosure sales by The St. Paul, Minneapolis and Manitoba Railway Company, in violation of Section 10 of Article I of the Constitution of the United States.

7. In holding that said Chapter 253 General Laws of Minnesota for the year 1903 was valid and enforceable against said Great Northern Railway Company as to said lines of railway in the first assignment of error described, because said Chapter 253 as construed by said Supreme Court of the State of Minnesota impairs the obligation of the contract created by the lease executed by The St. Paul, Minneapolis and Manitoba Railway Company unto the Great Northern Railway Company dated February 1, 1890, in violation of Section 10 of Article I of the Constitution of the United States.

8. In holding that the State of Minnesota was entitled to judgment against the Great Northern Railway Company in the sum of $121,601.27/100 or in any sum whatever, because of each and every of the errors hereinbefore assigned.

GREAT NORTHERN RAILWAY COMPANY.
By WM. R. BEGG, *Its Attorney.*

On reading the foregoing petition it is ordered that a writ of error be allowed and issue as therein prayed.

Dated January 23, 1909.

CHARLES M. START,
Chief Justice Supreme Court of Minnesota.

e STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the petition for writ of error in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 29th day of January, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

f Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff-in-Error,
v.
STATE OF MINNESOTA, Defendant-in-Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said cause, between the State of Minnesota, appellant and cross-respondent, and the Great Northern Railway Company, respondent and cross-appellant, wherein was drawn in question the validity of a statute of said state of Minnesota, alleged to impair the obligation of a contract and to deprive said Great Northern Railway Company of its property without due process of law, on the ground that said statute was repugnant to the Constitution of the United States, and the decision was in favor of the validity of such statute, a manifest error hath happened, to the great damage of the said Great Northern Railway Company as by its complaint ap-
g pears; we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within thirty days from the date hereof, in said Supreme Court of the United States, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23rd day of January A. D. 1909.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of the Circuit Court of the United States for the District of Minnesota,
By LOUISE B. TROTT, *Deputy.*

The above writ is allowed:
CHAS. M. START,
Chief Justice Supreme Court of the State of Minnesota.

h [Endorsed:] 15994–5. Supreme Court of the United States. Great Northern Railway Company, Plaintiff-in-error, *v.* State of Minnesota, Defendant-in-error. Writ of Error. Filed Jan. 23, 1909. C. A. Pidgeon, Clerk.

i Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff-in-Error,
v.
STATE OF MINNESOTA, Defendant-in-Error.

Citation.

United States of America to the State of Minnesota, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in Washington, D. C. within thirty days after the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Minnesota, wherein said Great Northern Railway Company is plaintiff-in-error and said State of Minnesota is defendant-in-error, to show cause, if any there be, why the judgment rendered against said plaintiff-in-error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota, this 23rd day of January, 1909.

CHAS. M. START,
Chief Justice Supreme Court of the State of Minnesota.

Due and personal service of the foregoing citation and receipt of a copy thereof is hereby admitted, at St. Paul, Minnesota, this 23rd day of January, 1909.

GEORGE T. SIMPSON,
Attorney General for the State of Minnesota;
GEORGE W. PETERSON,
Assistant Att'y Gen'l;
R. A. STONE,
Attorneys for Defendant-in-Error.

j [Endorsed:] Supreme Court of the United States. Great Northern Railway Co., Plaintiff-in-error, *v.* State of Minnesota, Defendant-in-error. Citation.

Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff-in-Error,
v.
STATE OF MINNESOTA, Defendant-in-Error.

Bond on Writ of Error.

Know all men by these presents: That we, the Great Northern Railway Company, as principal, and the National Surety Company, a corporation organized and existing under the laws of the State of New York, as surety, are held and firmly bound unto the State of Minnesota, in the full and just sum of Two thousand dollars ($2000.), to be paid the said State of Minnesota, its representatives or assigns, for which payment well and truly to be made we jointly and severally bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 22nd day of January, 1909.

The condition of this obligation is such that whereas, lately in the Supreme Court of the State of Minnesota, in a suit pending in said court between the State of Minnesota and said Great Northern Railway Company, judgment was rendered against said Great Northern Railway Company and in favor of said State, and said Great Northern Railway Company has obtained a writ of error from the Supreme Court of the United States to said Supreme Court of the State of Minnesota to review said judgment aforesaid, and has filed said writ of error in the Clerk's office of said Supreme Court of the State of Minnesota, and a citation directed to the State of Minnesota requiring it to appear at the Supreme Court of the United States at Washington within thirty days after the date of such writ having been issued.

Now therefore, if the said Great Northern Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise it shall remain in full force and effect.

In witness whereof: The said principal and surety have caused their corporate names and seals to be hereunto affixed, by their respective proper officers, the day and year hereinabove written.

GREAT NORTHERN RAILWAY COMPANY,
By L. W. HILL, *President.*
Attest: E. SAWYER, *Assistant Secretary.*

[Corporate Seal G. N. Ry.]

NATIONAL SURETY COMPANY,
By W. C. McCURDY, *Attorney-in-Fact.*

[National Surety Co. Corporate Seal.]

Executed in the presence of:
H. H. PARKHOUSE.
E. W. McELROY.
R. C. SMITH.
NAN SNYDER.
D. J. YORK.
W. E. CHRISTIANSON.

I hereby approve the above bond and the surety thereon this 22nd day of January, 1909.

CHARLES M. START,
Chief Justice Supreme Court of the State of Minnesota.

m STATE OF MINNESOTA,
County of Ramsey, ss:

On this 22nd day of January, 1909, before me personally appeared L. W. Hill and Edward Sawyer, to me known, who being first duly sworn each for himself did depose and say: That they are the President and Assistant Secretary, respectively, of the Great Northern Railway Company, the corporation which executed the foregoing instrument as principal therein; that the seal attached to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors. And said L. W. Hill and Edward Sawyer thereupon acknowledged said instrument to be the free act and deed of said corporation.

[Notarial Seal. A-2-7-14-08-1500.]

EARLE W. McELROY,
Notary Public, Ramsey County, Minnesota.

My commission expires April 14, 1911.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 23rd day of January, A. D. 1909, before me appeared W. S. McCundy, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporation seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said W. S. McCundy acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] D. I. YORK,
Notary Public, Ramsey County, Minnesota.

My Commission expires Aug. 25th, 1915.

a [Endorsed:] Copy. Supreme Court of the United States. Great Northern Railway Co., Plaintiff-in-error, *v.* State of Minnesota, Defendant-in-error. Bond on Writ of Error.

o STATE OF MINNESOTA:

Supreme Court, October Term, 1908.

STATE OF MINNESOTA, Appellant and Cross-respondent.
v.
GREAT NORTHERN RAILWAY COMPANY, Respondent and Cross-appellant.

Stipulation.

Whereas: Judgment was on the 21st day of January 1909, entered in said Supreme Court in the above entitled cause in favor of the State of Minnesota and against said Great Northern Railway Company for the sum of $121,601.27 100, and said Great Northern Railway Company desires to sue out a writ of error from the Supreme Court of the United States to said Supreme Court of the State of Minnesota to review said judgment:

Now therefore, it is stipulated between the parties hereto that said Great Northern Railway Company shall execute and file a bond on said writ of error in the sum of Two thousand dol-
p lars ($2000), which bond shall be taken as good and sufficient supersedeas in said cause.

GEORGE T. SIMPSON,
Attorney General;
R. A. STONE,
Attorneys for Appellant and Cross-Respondent.
WM. R. BEGG,
Attorney for Respondent and Cross-Appellant.

q STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the bond and stipulation fixing the amount thereof in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 29th day of January, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

STATE OF MINNESOTA:

Supreme Court, October Term, 1908.

STATE OF MINNESOTA, Appellant,
v.
GREAT NORTHERN RAILWAY COMPANY, Respondent.

STATE OF MINNESOTA, Respondent,
v.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Assignments of Error of Great Northern Railway Company.

I.

The court erred in its conclusions of law that the State of Minnesota is, under Chapter 253 of the Laws of 1903, entitled to judgment against the Great Northern Railway Company in an amount equal to one per centum of the gross earnings for the year 1905 of the several branch lines described in the court's findings of fact, or any of them (ff. 1938, 1940, 1967), because said Chapter 253 of the Laws of 1903 as construed by the said court impairs the obligation of the contract with reference to the taxation of said lines created by the acts of the legislative assembly of the Territory of Minnesota of May 22, 1857, and acts amendatory thereof, and the acceptance of said acts, in violation of Section 11 of Article I of the Constitution of the State of Minnesota, and Section 1 of the schedule attached to said constitution; and in violation of Section 10 of Article I of the Constitution of the United States.

II.

The court erred in its conclusion of law that the State of Minnesota is, under Chapter 253 of the Laws of 1903, entitled to judgment against the Great Northern Railway Company in an amount equal to one per centum of the gross earnings for the year 1905 of the several branch lines described in the court's findings of fact, or any of them (ff. 1938, 1940, 1967) because said Chapter 253 as construed by the court, deprives said Great Northern Railway Company of its property without due process of law in that it attempts to destroy and take from said Great Northern Railway Company without compensation a right appurtenant to said lines of railway created by said act of May 22, 1857, and acts amendatory thereof and the acceptance of said acts, in violation of Section 7 of Article I of the Constitution of the State of Minnesota, and of Section 1 of Article XIV of the amendments to the Constitution of the United States.

III.

The court erred in holding and deciding that said Chapter 253 of the Laws of 1903, was constitutional and valid as applied to said

branch lines of railway described in the court's findings of fact (ff. 1938, 1940, 1967), because said Chapter 253 as so construed
t is unconstitutional and void in that it impairs the obligation of the contract created by said act of May 22, 1857, and acts amendatory thereof, and the acceptance of said acts, in violation of Section 11 of Article I of the Constitution of the State of Minnesota and of Section 10 Article I of the Constitution of the United States; and also because the said Chapter 253 as construed by the court, deprives said Great Northern Railway Company of its property without due process of law, in violation of Section 7 Article I of the Constitution of the State of Minnesota and Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that it attempts to destroy and take away an appurtenant and incident of the said branch lines of railway above described.

IV.

The court erred in its conclusion of law that the State of Minnesota is entitled to judgment against said Great Northern Railway Company in an amount equal to one per centum of the gross earnings for the year 1905 of the several branch lines described in the court's findings of fact, or any of them (ff. 1938, 1940, 1967), because said conclusion of law necessarily rests upon Chapter 253 of the Laws of 1903, and said Chapter 253 as construed by the court impairs the obligation of the contract created by the several mortgages executed by the St. Paul and Pacific Railroad Company and the First Division of the St. Paul and Pacific Railroad Company, and the foreclosure of said mortgages, and the purchase of the railways, properties, franchises, privileges and immunities of said companies by The St. Paul, Minneapolis and Manitoba Railway Company, in violation of Section 11 Article I of the Constitution of the State of Minnesota, and Section 10 Article I of the Constitution of the United States.

u V.

The court erred in its conclusion of law that the State of Minnesota is entitled to judgment against the Great Northern Railway Company in an amount equal to one per centum of the gross earnings for the year 1905 of the several branch lines described in the court's findings of fact or any of them (ff. 1938, 1940, 1967), because said conclusion necessarily rests upon Chapter 253 of the Laws of 1903 and said Chapter 253 as construed by the court impairs the obligation of the contract created by the lease executed by The St. Paul, Minneapolis and Manitoba Railway Company unto the Great Northern Railway Company dated February 1, 1890, in violation of Section 11 Article I of the Constitution of the State of Minnesota and Section 10 Article I of the Constitution of the United States.

VI.

The court erred in holding that said branch lines of railway described and set forth in the court's findings of fact were not included

within the provisions of said act of May 22, 1857, and the acts amendatory thereof, and were taxable otherwise than as provided in said acts (ff. 1938, 1958).

VII.

The court erred in its conclusion of law that the State of Minnesota is entitled to judgment against the Great Northern Railway Company in an amount equal to one per centum of the gross earnings for the year 1905 of the several branch lines described in the court's findings of fact, or any of them (ff. 1938, 1940, 1967) because said conclusion necessarily rests upon Chapter 253 of the Laws of 1903 and said chapter as construed by the court is unconstitutional and void (1) because it impairs the obligation of the contract with reference to the taxation of said branch lines created by said act of May 22, 1857, of the legislative assembly of the Territory of Minnesota as amended by an act of the legislature of the State of Minnesota entitled "An act to facilitate the completion of the St. Paul and Pacific Railroad and Branches," approved March 2, 1865, and the acceptance of said acts, in violation of Section 11 of Article I of the Constitution of the State of Minnesota, and in violation of Section 10 Article I of the Constitution of the United States; and (2) because said Chapter 253 as construed by the court deprives the said Great Northern Railway Company of its property without due process of law in that it destroys and takes from said Great Northern Railway Company, without compensation therefor a property right appurtenant to said lines of railway created by said act of May 22, 1857, and acts amendatory thereof, and the acceptance of said acts, in violation of Section 7 of Article I of the Constitution of the State of Minnesota and Section 1 of Article XIV of the Amendments to the Constitution of the United States.

VIII.

The court erred in entering judgment in favor of said State of Minnesota and against said Great Northern Railway Company for the sum of $32,632.55 (ff. 2003-2007), because of each and every of the errors hereinbefore assigned.

Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff-in-Error,
v.
STATE OF MINNESOTA, Defendant-in-Error.

Assignment of Errors.

Comes now the Plaintiff-in-error, Great Northern Railway Company at the time of the presenting and filing of its petition for a writ of error in the above entitled cause, and states that in the record and proceedings, as also in the final judgment of the Supreme Court of the State of Minnesota in the above entitled matter, there is manifest error in this, to-wit:

The said Supreme Court of the State of Minnesota erred:

1. In holding that the act of the Legislative Assembly of the Territory of Minnesota of May 22, 1857, as amended by the acts of the Legislature of the State of Minnesota of March 2 and March 4, 1865, did not create a valid and irrepealable contract as to the taxation of the lines of railroad provided for in said act of May 22, 1857, which had been constructed by the Minnesota and Pacific Railroad Company, the St. Paul and Pacific Railroad Company, the First Division of the St. Paul and Pacific Railroad Company and The St. Paul, Minneapolis and Manitoba Railway Company and which are operated by said Great Northern Railway Company under a lease thereof.

2. In holding that said Great Northern Railway Company did not become vested with and entitled to the benefits of said contract as to the taxation of said lines of railway described in the preceding assignment of error as an appurtenant to said lines of railway.

3. In holding that Chapter 253 General Laws of Minnesota for the year 1903 did not impair the obligation of said contract mentioned in the first assignment of error.

4. In holding that said Chapter 253 General Laws of Minnesota for the year 1903, did not deprive said Great Northern Railway Company of a contract right appurtenant to said lines of railway without due process of law.

5. In holding that Chapter 253 General Laws of Minnesota for the year 1903 was valid and enforceable against said Great Northern Railway Company as applied to the lines of railway described in the first assignment of error, for the reason that said Chapter 253 as construed by the Supreme Court of the State of Minnesota impairs the obligation of the contract with reference to the taxation of said lines of railway, which contract was created by said act of May 22, 1857 as amended by said acts of March 2 and March 4, 1865, and the acceptance of said acts, in violation of Section 10 of Article I of the Constitution of the United States; and for the further reason that said Chapter 253 as construed by said Supreme Court of the State of Minnesota deprives said Great Northern Railway Company of its property without due process of law in that it destroys and takes away from said Great Northern Railway Company without any compensation therefor a right appurtenant to said lines of railway created by said act of May 22, 1857, as amended by said acts of March 2 and March 4, 1865, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

6. In holding that said Chapter 253 General Laws of 1903 was valid and enforceable against said Great Northern Railway Company as to the lines of railway described in the first assignment of error, for the reason that said Chapter 253 as construed by the said Supreme Court of the State of Minnesota impairs the obligation of the contract created by the several mortgages executed by the St. Paul and Pacific Railroad Company, and the First Division of the St. Paul and Pacific Railroad Company and the foreclosures of said mortgages and the purchases of the railways, properties, franchises,

privileges and immunities of said companies under said foreclosure sales by The St. Paul, Minneapolis and Manitoba Railway Company, in violation of Section 10 of Article I of the Constitution of the United States.

7. In holding that said Chapter 253 General Laws of Minnesota for the year 1903 was valid and enforceable against said Great Northern Railway Company as to said lines of railway in the first assignment of error described, because said Chapter 253 as construed by said Supreme Court of the State of Minnesota impairs the obligation of the contract created by the lease executed by The St. Paul, Minneapolis and Manitoba Railway Company unto the Great Northern Railway Company dated February 1, 1890, in violation of Section 10 of Article I of the Constitution of the United States.

8. In holding that the State of Minnesota was entitled to judgment against the Great Northern Railway Company in the sum of $121,601 27/100 or in any sum whatever, because of each and every of the errors hereinbefore assigned.

Wherefore: The said plaintiff-in-error prays that the judgment of the Supreme Court of the State of Minnesota be reversed and that judgment be entered in favor of said plaintiff-in-error and against the defendant-in-error herein.

WM. R. BEGG,
Attorney for Plaintiff-in-Error.

STATE OF MINNESOTA, *Supreme Court, ss:*

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Assignments of error in the causes therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 29th day of January A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

1 STATE OF MINNESOTA:

In Supreme Court, October Term, 1908.

STATE OF MINNESOTA:

District Court, County of Ramsey, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Complaint.

For its complaint herein the State of Minnesota alleges:

I.

That the defendant is now, and during all the times hereinafter mentioned has been, a corporation organized and existing under and by virtue of the laws of Minnesota.

2 II.

That during all the times hereinafter mentioned the defendant has been, and now is, the owner and in possession of a line of railway running from the city of St. Paul in the State of Minnesota to the village of Breckenridge in the County of Wilkin in said state; and of another line of railway running from said city of St. Paul to the village of St. Vincent in the County of Kittson in said state, and numerous other branch or auxiliary lines of railway in said state, all of which said lines of railway the said defendant has been during all of said times, and now is, operating in the usual manner as a common carrier of freight and passengers.

III.

That the gross earnings received by defendant from the operation of said lines of railway within the state of Minnesota, during the year 1905, amounted to the sum of $18,540,396.27. That four per cent. of said sum is $741,615.85, and that on March 1st, 1906, the said last named sum became due from the defendant to the State of Minnesota as its gross earnings tax for the year 1905.

IV.

That payment of said sum of $741,615.85 has been heretofore duly demanded of the defendant, but that defendant has neglected and refused and still does neglect and refuse to pay to the plaintiff, on account of its gross earnings tax for the year 1905, any other
3 or greater sum than $620,878.47, which sum has been heretofore paid to the plaintiff, and that by reason of the premises

there is now due and owing to the plaintiff from the defendant the sum of $120,737.38, with lawful interest.

Wherefore, plaintiff prays judgment against the defendant for the sum of $120,737.38, together with lawful interest and the costs and disbursements of this action.

EDWARD T. YOUNG,
Attorney General;
ROYAL A. STONE,
Assistant Attorney General,
Attorneys for Plaintiff.

State Capitol, St. Paul, Minnesota.

(Title of Cause.)

Answer.

The defendant, for answer to the complaint,

I.

Admits that it has been and is a corporation as therein alleged.

II.

Denies that it is or ever has been the owner of any of the lines of railroad described or referred to in said complaint.

4

III.

The defendant admits and avers that at all times mentioned in the complaint it has operated the lines of railroad within the State of Minnesota belonging to the Eastern Railway Company of Minnesota (hereinafter called the Eastern Ry. Co.), and also the lines of railroad within said state belonging to the St. Paul, Minneapolis & Manitoba Railway Company (hereinafter styled the Manitoba Co.), and has operated no other railroads in said state and has operated the said railroads of said companies under and by virtue of leases from, and as a lessee of, said companies respectively, the lines of the Manitoba Co. having been so operated ever since February 1, 1890, under a lease bearing date on that day.

IV.

That on or prior to March 1, 1906, the defendant did pay into the treasury of the plaintiff a sum of money equal to four per cent. of the gross earnings derived from the operation of said lines of railroad of said Eastern Railway Co. within the State of Minnesota, as required by Chapter 253 of the General Laws of said state for 1903.

V.

That the lines of the Manitoba Co., so leased by it to the defendant, are the same lines, including the branches thereof, formerly owned

cessively by the Minnesota & Pacific Railroad Company (hereinafter styled the Minnesota & Pacific Co.), the St. Paul & Pacific Railroad Company, and the First Division of the St. Paul & Pacific Railroad Company (hereinafter styled the First Division Co.), and comprise a line extending from St. Paul to Breckenridge, formerly known as the "Main Line," and line from East Minneapolis (formerly St. Anthony) to St. Vincent; that portion of said last named line between St. Anthony and Watab, having formerly been known as the "Branch Line," and that between East St. Cloud and St. Vincent having been formerly known as the "Extension Line" or "St. Vincent Extension." And all of said lines and branches were built and have always been and are now operated by virtue and authority of the provisions of the charter of said Minnesota & Pacific Co. and the acts amendatory thereof.

VI.

That the said Minnesota & Pacific Co. was chartered and created a corporation by chapter one of an act of the legislative assembly of the territory of Minnesota, approved May 22, 1857, entitled "An Act to execute the trust created by an act of Congress, entitled 'An Act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections in the State of Alabama, to aid in the construction of a certain railroad in said state,' and granting certain lands to railroad companies therein named;" and by said act the said company was authorized to construct and operate certain lines of railroad therein named, and branches, including the aforesaid Main Branch, and Extension lines.

VII.

That in and by said act of May 22, 1857, it was provided (in the 18th section of Chapter one thereof) as follows, in regard to taxation of the Minnesota & Pacific Co. or its property:

"SEC. 18. In consideration of the grants, privileges and franchises herein conferred on the said Minnesota and Pacific Railroad Company, the said Company shall and will, on or before the first day of March in each year, pay into the Treasury of the Territory or future state, three per centum of the gross earnings of the said railroad, for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever."

And in and by said section 18 it was further provided as follows:

"And for securing to the Territory or State the payment of the aforesaid per centum, it is hereby declared that the State shall have a lien upon the railroads of the said company, and upon all other property, estate and effects of the said company, whether real, personal or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company."

And in and by said section 18 it was further provided as follows:

"And in consideration of such annual payments the said
7 company shall be forever exempt from all assessments and taxes whatever by the Territory or State which shall succeed the Territory, or by any county, city, town, village or other municipal authority in the Territory or State upon all stock in the said 'Minnesota and Pacific Railroad Company,' whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal, or mixed, held by said company."

VIII.

Said Minnesota & Pacific Co. accepted said act and began the construction of said lines, and the said provisions concerning the payment of a per centum of gross earnings in lieu of all other taxes and for exemption from all other taxation and from all assessments thereupon became a contract between said Territory and said company, irrevocable by either party thereto.

IX.

Said Minnesota & Pacific Co. failed to complete said lines and made default in the condition of a mortgage upon its property and franchises, made by it to Eton Farnsworth and others and bearing date July 31, 1858, and a supplement thereto bearing date November 27th, 1858, whereupon the said mortgage was foreclosed by sale at public auction pursuant to advertisement as in said mortgage and supplement provided, at which sale made on the 23d day of July, 1860, the State of Minnesota did purchase and become the owner of, and did thereafter own and hold, without merger or extinguishment,
all the properties, lands, franchises, rights, immunities and
8 privileges of said company, including all its rights under its charter and the contract in respect of the payment of gross earnings and the exemption from all other taxation therein contained; and said state did continue then to own and hold the same until March 10, 1862, when by a public act of the Legislature, approved on that day and entitled "An Act to facilitate the construction of the Minnesota & Pacific Railroad, and to amend and continue, the act of incorporation relating thereto" all the rights, benefits, immunities, privileges, property, franchises and interests granted by said act of May 22, 1857, to the Minnesota & Pacific Co., and acquired and held by said State as hereinbefore stated, were granted to Dwight Woodbury and other persons named, their associates and successors, as a corporation by the name of the St. Paul & Pacific Railroad Company.

X.

The said St. Paul and Pacific Railroad Company (hereinafter styled the St. Paul & Pacific Co.,) accepted said act and thereupon became entitled to all the rights and subject to all the obligations of the said contract contained in said act of May 22, 1857, to which the Minnesota & Pacific Co. had originally been entitled or subject, and a contract was thereupon created between said State and the St. Paul & Pacific Co., in respect of payment of gross earnings in lieu

of other taxation and exemption from all other taxation and all assessments, in the terms of the provisions of said act of May 22, 1857, hereinbefore stated.

9

XI.

In the year 1864, by proceedings duly had pursuant to the provisions of a public law of this state, entitled "An act to amend the charter of the St. Paul & Pacific Railroad Company," approved February 6, 1864, the said First Division of the St. Paul & Pacific Railroad Company (hereinafter styled the First Division Co.) was duly organized as a corporation, and became owner of said Main line from St. Paul to Breckenridge and of said branch line from St. Paul to Watab, and possessed of and entitled to use, enjoy and exercise all the rights, benefits, privileges, property, franchises, powers and interests of the Minnesota & Pacific Co. and of the St. Paul & Pacific Co., belonging or pertaining to said lines. Which said organization of the First Division Co., and its right and title to said lines of railroad, lands, franchises and immunities, were duly confirmed in said company by a public law of this state, approved February 6, 1866, entitled, "An Act to legalize and confirm the organization, acts and proceedings of the First Division of the St. Paul & Pacific Railroad Company, and in relation to the charter and powers of said company."

XII.

That said acts were duly accepted by said First Division Co., and thereupon the said First Division Co. became, in respect of said Main and Branch lines, entitled to and possessed of all the rights conferred and subject to all the obligations imposed on the Min-

10 nesota & Pacific Co. by the aforesaid contract expressed in the said act of May 22, 1857, and possessed of the same rights and subject to the same obligations which the St. Paul & Pacific Co. had theretofore possessed or been subject to by reason of its contract with said State. And thereupon a contract was created between said First Division Co. and the State in respect of the payment of a percentage of gross earnings in lieu of all other taxation and all assessments, in the terms of the provisions of said Act of May 22, 1857, hereinabove set forth.

XIII.

Between 1862 and 1871 the St. Paul & Pacific Railroad Company and the First Division Co. severally executed divers trust deeds or mortgages of the said Main, Branch or Extension lines, according to their ownership of the same, each of said mortgages including all franchises connected with or relating to said railway and all corporate franchises, including the franchise to be a corporation, which, at the date of such mortgage, was or which might thereafter be possessed or exercised by the company making such mortgages.

XIV.

That the Manitoba Co. is a railway corporation formed by the purchases of said Branch line at the sale thereof on May 7, 1879.

pursuant to a judgment of the District Court for Ramsey County, in a suit to foreclose one of the said mortgages of said Branch line, to-wit: a mortgage for $2,800,000, made by said First Di-
11 vision Co. to George L. Becker, Horace Thompson and George T. M. Davis, trustees, and bearing date October 1, 1865, which sale was on June 10, 1879, duly confirmed. Said purchasers having duly met and organized as the St. Paul, Minneapolis & Manitoba Railway Company on the 23rd day of May, 1879, and said Company having thereafter made on June 11, 1879, and filed for record in the office of the Secretary of State of this State on June 21, 1879, the certificate required by the Act approved March 6, 1876, being Chapter 30, of the General Laws of that year, and entitled "An Act to amend Title 1 of Chapter 34 of the General Statutes relating to Corporations."

That thereafter and in the month of June, 1879, the said Manitoba Co. purchased said Main and said Branch line under decrees of said District Court in suits to foreclose said mortgages thereon, and purchased said Extension line at a like sale under decree of the United States Circuit Court for Minnesota in a suit to foreclose a mortgage thereof made by said St. Paul & Pacific Railroad Company, all of which sales were by said respective courts, in said month of June, 1879, duly confirmed.

XV.

That by virtue of said purchases and proceedings and of the provisions of said Chapter 30 of the Laws of 1876, and of an act entitled "An Act to amend Chapter 30 of the General Laws of Minnesota for the year 1876, relating to foreclosure of Railroads," approved March 10, 1879, being Chapter 49 of the General Laws of that year,
12 the Manitoba Co. became invested in respect of each of said lines so purchased, and the use and enjoyment thereof, with all and singular the franchises, rights, powers, privileges and immunities theretofore granted to or possessed by the corporation making such mortgage or deed of trust and applicable to the railroad and property so purchased, to the same extent and with the like effect as if the same had been originally conferred upon such purchaser; and acquired and still possesses the same contract rights which were theretofore possessed by the Minnesota & Pacific Co., the St. Paul & Pacific Co., and the First Division Co., as hereinbefore stated, in respect of payment of three per centum of gross earnings in lieu of all other taxes, and in respect of exemption from all other taxes and all assessments, under the contract whose terms are stated in the provisions of the Act of May 22, 1857, hereinbefore set forth.

That said lines of railroad and branches were long since constructed, completed and put in operation and have ever since construction been continuously operated by virtue of and in accordance with the said several acts of said legislature, by the said St. Paul & Pacific Co., said First Division Co., said Manitoba Co., and this defendant as lessee of said Manitoba Co.

That said companies and this defendant have at all times fully complied with all the provisions of said act of May 22, 1857, and

amendatory acts in respect of returns of gross earnings and paying a tax of three per centum thereon in lieu of all other taxes, and have duly paid and satisfied all said taxes on gross earnings as the
13 same have accrued and become payable.

XVI.

Further answering this defendant says that its gross earnings on all the railroads operated by it in Minnesota for the year 1905, were as follows:

The gross earnings of the railroads leased by it as aforesaid from the Eastern Ry. Co. were.....	$6,466,658.02
The gross earnings of the railroads leased as aforesaid from the Manitoba Co. were.....	12,073,738.25
The total of such earnings being.....	$18,540,396.27

Which amounts were duly reported by this defendant to the State Treasurer as required by law.

That on said $6,466,658.02 gross earnings of said lines leased from said Eastern Ry. Co., the defendant did, prior to the commencement of this action and within the time required by law pay into the State Treasury the amount of the four per centum tax imposed by Chapter 253 of the General Laws of this State for 1903, being the sum of	$258,666.32
And did, prior to the commencement of this action and within the time required by law pay into the State Treasury the amount of the three per centum tax on said $12,073,738.25 gross earnings of the said lines leased from the Manitoba Co., as required by said act of May 22, 1857, and the contract therein expressed, the amount so paid being	362,212.15
Making the total amount paid.....	620,878.47

Being the same amount stated in the complaint to have been paid by the defendant.

14 XVII.

The sum of $120,737.38, alleged in the complaint to be due and unpaid and for which judgment is demanded, is one per centum of the gross earnings of the railroads leased as aforesaid from the Manitoba Co., on which earnings the three per centum tax provided in said contract has been paid. And the sole ground of the claim by the State to recover the same is that by the Act of the Legislature entitled, "An Act providing for the taxation of railroad properties, the collection of such taxes, and repealing acts inconsistent there-

with," approved April 18, 1903, and being Chapter 253 of the laws of that year, and thereafter approved by popular vote at the general election of 1904, every company operating any line of railway in this state is required to pay into the State Treasury, on or before the first day of March in each year, a tax of four per centum on the amount of the gross earnings of such lines within this state for the year immediately preceding.

And this defendant says that said act, in so far as it purports or attempts or (if enforced) operates, to impose such tax on the gross earnings of said lines operated by this defendant under lease from the Manitoba Co. is void in that it impairs the obligation of said contract expressed in said Act of May 22, 1857, and so violates Section Ten of Article One of the Constitution of the United
15 States; and likewise violates Section Eleven of Article One of the Constitution of this State, and Section One of the Schedule thereof.

R. A. WILKINSON,
GEORGE B. YOUNG,
Attorneys for Defendant, St. Paul, Minnesota.

(Duly acknowledged.)

(Title of Cause.)

Amended Reply.

For its amended reply to the answer herein, plaintiff.

I.

Admits and avers that the St. Paul, Minneapolis and Manitoba Railway Company, mentioned in the answer (hereinafter called the Manitoba Company), for a long time prior to February 1, 1890, owned and operated the lines of railway described in said answer, which said lines extended not only from the initial points in said State of Minnesota to the several points mentioned on its western boundary, but to points further west in the States of North and South Dakota, and into the State of Montana, with several branches in the said other states, and that all of said lines extending from St. Paul and Minneapolis in said State of Minnesota to their various
termini in said several other states were connected and con-
16 tinuous lines of railroad, and prior to February 1, 1890, were operated as one system of railroad by said Manitoba Company.

II.

Avers that on February 1, 1890, when the lines mentioned in the answer were transferred to defendant by the contract, which in the answer is called a lease, under which defendant assumed the operation of the same, there was, as a part of the same transaction and by the same instrument, also transferred to defendant all of

the extensions of said line into and across said other states, hereinbefore referred to, and when defendant assumed the control and operation of said lines in Minnesota it also assumed upon the said terms and in the same manner the operation and control of said interstate extensions and branches belonging to said Manitoba Company's railroad system, and defendant has ever since continuously operated all of said railroad lines herein referred to as one united system upon which it has carried on both state and interstate business, that since February 1, 1890, the lines of railroad at that time, as aforesaid, taken by defendant from said Manitoba Company, have been further extended to Puget Sound on the Pacific coast, and such extension and many additional branches, constructed in that and other states, as fast as constructed, have been made, and at the time mentioned in the complaint, were operated by defendant as a part of said original system.

17 III.

Admits all of paragraphs VI and VII of the answer, and with respect to the Act of the Legislative Assembly of the Territory of Minnesota, approved May 22, 1857, avers that the same, in §18 thereof, in addition to the portions thereof set forth in said paragraph VII, provided in part as follows:

"And for the purpose of ascertaining the said earnings an accurate account shall be kept by said company of all receipts and expenditures on account of the operation of said railroads, and abstracts thereof, shall be furnished by said company to the Treasurer of the Territory or State, on or before the first day of February in each year, the truth of which shall be verified by the affidavits of the Secretary and Treasurer of said company; and for the purpose of ascertaining the truth of said affidavits, and the correctness of such abstracts, full power is vested in the Governor, or any other person appointed as may be by law prescribed, to examine the books and papers of said company, and to examine under oath the officers, agents and employés of said company, and other persons, and if any person so examined by the Governor or other authorized person, shall knowingly and wilfully swear falsely concerning the matters aforesaid, every such person is hereby declared to have committed perjury."

18 IV.

Admits that the Minnesota and Pacific Company accepted said Act, but avers that it wholly failed to complete any of its lines and made default in the conditions of the mortgage or trust deed, dated July 21, 1858, given on its "lands, roads and franchises" as authorized by the Constitutional Amendment of 1858, whereupon said mortgage was foreclosed by sale of the mortgaged property on July 23, 1860, at public auction, pursuant to advertisement, and only the said property covered by said instrument, was purchased at said sale by the State of Minnesota, which thereupon became the absolute owner thereof. Admits that a special Act of the Legislature

was passed and approved on March 10, 1862, entitled "An Act to facilitate the construction of the Minnesota and Pacific Railroad Company, and to amend and continue the Act of incorporation relating thereto."

V.

Admits the passage and approval, on February 6, 1864, of a special Act entitled "An Act to amend the charter of the St. Paul and Pacific Railroad Company;" and the approval on February 6, 1866, of a special Act entitled "An Act to legalize and confirm the organization, acts and proceedings of the First Division of the St. Paul and Pacific Railroad Company, and in relation to the charter and powers of said Company."

19

VI.

Admits all of the allegations in the first 15 lines of paragraph XIV of the answer, and that all of the lines of railroad referred to in the answer, prior to 1905, were constructed, completed and put into operation; and avers that prior thereto all the lands granted to the said companies or any of them by the United States or the State of Minnesota to aid in the construction of said lines were sold and disposed of by the said companies.

Avers that all of the Acts of the Legislature of the State of Minnesota mentioned in paragraphs I to XV, inclusive, of said answer, were and are unconstitutional and void insofar as they or any of them attempted to create, or continue in favor of, or confer upon, any of the persons or corporations mentioned therein, or their successors or assigns, any immunity from taxation, or any method of taxation in conflict with § 1 of Article IX of the Constitution of the State of Minnesota, and that the special Acts of the Legislature of said state in said answer referred to were and are unconstitutional and void as in conflict with § 2 of Article 10 of said Constitution insofar as they or either of them attempted or purported to create a railroad corporation or corporations.

VII.

Plaintiff avers that it relies on chapter 253 of the laws of 1903, as approved by the popular vote of 1904, for recovery herein. Except as hereinbefore admitted or stated, plaintiff denies each
20 and every allegation in paragraphs VIII, X, XI, XII and XV of said answer and also in the last four lines of paragraph V thereof and in the last eight lines of paragraph XVII of said answer.

VIII.

As to the allegations in said answer contained, not herein expressly admitted, qualified or denied, plaintiff avers that it has no knowledge nor information sufficient to form a belief and, therefore, denies the same and all thereof, except as the same admit the allegations of the complaint herein.

Wherefore plaintiff demands judgment against the defendant as prayed for in the complaint herein.

EDWARD T. YOUNG,
Attorney General;
R. A. STONE,
Assistant Attorney General,
Attorneys for Plaintiff, St. Paul, Minn.

(Title of Cause.)

Stipulation.

It is hereby stipulated by and between the parties to the above entitled action that the transcript hereto attached, consisting of 681 typewritten pages, contains all the evidence produced on the trial of the above entitled cause, all offers of evidence, rulings thereon and all other proceedings had or taken on said trial; and that
21 said transcript may be without notice signed, allowed and filed as and for the settled case in said action.

EDWARD T. YOUNG,
Attorney General;
R. A. STONE,
Attorneys for Plaintiff.
WM. R. BEGG,
Attorney for Defendant.

(Title of Cause.)

This cause came on to be heard before Hon. Olin B. Lewis, at special term, on Saturday, November 16, 1907.

Royal A. Stone appeared on behalf of plaintiff, and William R. Begg on behalf of defendant.

Mr. STONE: May it please the Court, as I view this case, the burden of proof is on the defendant under the pleadings. We have the figures as to the gross earnings admitted. That admission, coupled with the law as the Court takes judicial knowledge of it, makes our case in the first instance, as I view it.

Mr. BEGG: We admit the burden of proof is on us.

The defendant first offers in evidence a stipulation of certain facts. The stipulation substantially admits the organization of the companies as alleged, and the passage by the legislature of certain special acts, the execution of certain mortgages and the foreclosure thereof.

The State expressly reserves the right to question any state-
22 ment in this stipulation that may be an admission of the proper construction of any law, any mortgage, or any other instrument, except only it admits that all the mortgage foreclosure proceedings were valid, and that the purchasers at the foreclosure sales acquired all the property rights and other things included and conveyed in the mortgages. That makes it necessary for us to offer in evidence certain other matters.

The stipulation presented by Mr. Begg was received in evidence and marked Def't's Ex. 1.

Mr. BEGG: I next offer in evidence an act of the territory of Minnesota entitled "An Act to execute the trust created by an act of Congress entitled 'An Act making a grant of land to the territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said state,' and granting certain lands to railroad companies therein named," Approved May 22, 1857.

The Act above referred to was received in evidence and marked Def't's Ex. 2.

Mr. BEGG: I offer in evidence a certified copy of the acceptance of the act contained in Ex. 2.

Received in evidence and marked Def't's Ex. 3.

Mr. BEGG: I offer in evidence certified copy of the notification to the governor of the intention of the Minnesota & Pacific Company to avail itself of the provisions of the amendment to the constitution of Minnesota adopted in April, 1858.

23 The same was received in evidence and marked Def't's Ex. 4.

Mr. BEGG: I offer in evidence a certified copy of a trust deed dated July 31, 1858, executed by the Minnesota & Pacific Railroad Company, to Elon Farnsworth and others. Received in evidence and marked Def't's Ex. 5.

I offer in evidence a certified copy of an indenture executed by the Minnesota & Pacific Railroad Company to the state of Minnesota, pledging to the state of Minnesota the net earnings of the Minnesota & Pacific road, as required by the constitutional amendment of April, 1858. Received in evidence and marked Def't's Ex. 6.

I offer in evidence a certified copy of the deed executed by the Minnesota & Pacific Railroad Company to the state of Minnesota, conveying to the state certain lands in the deed described, executed in pursuant- of the constitutional amendment of April, 1858. Received in evidence and marked Def't's Ex. 7.

I offer in evidence a certified copy of an indenture executed by the Minnesota & Pacific Railroad Company to Elon Farnsworth and others, dated November 27, 1858, being supplemental to the trust deed dated July 31, 1858. Received in evidence and marked Def't's Ex. 8.

Mr. BEGG: I offer in evidence a certified copy of the foreclosure proceedings, the foreclosure of the Farnsworth mortgage, being the notice of the foreclosure, proof of publication of the notice, and the certificate as to said publication and the sale of lands made

24 by Governor Ramsey. The same were received in evidence and marked Def't's Ex. 9.

I offer in evidence a certified copy of the deed executed by the Minnesota & Pacific Railroad Company by Alexander Ramsey, its attorney in fact, to the State of Minnesota, being the deed executed under the foreclosure proceeding last referred to. Received in evidence and marked Def't's Ex. 10.

I offer in evidence an act entitled "An Act to facilitate the construction of the Minnesota & Pacific Railroad," approved March 8, 1861. Received in evidence and marked Def't's Ex. 11.

I offer in evidence an act entitled "An Act to facilitate the construction of the Minnesota & Pacific Railroad, and to amend and continue the act of incorporation relating thereto, approved March 10, 1862. Received in evidence and marked Def't's Ex. 12.

I offer in evidence an act to amend the charter of the St. Paul & Pacific Railroad Company, approved February 6, 1864. Received in evidence and marked Def't's Ex. 13.

I offer in evidence a certified copy of an agreement entered into between the St. Paul & Pacific Railroad Company and E. B. Litchfield, dated February 6, 1864. Received in evidence and marked Def't's Ex. 14.

I offer in evidence an act to legalize and confirm the organization, acts and proceedings of the First Division of the St. Paul & Pacific Railroad Company, and in relation to the charter and powers of said company, approved February 6, 1866. Received in evidence
25 and marked Def't's Ex. 15.

I offer in evidence an act entitled "An Act to aid and facilitate the completion of the St. Paul & Pacific Railroad and branches, approved March 2, 1865. Received in evidence and marked Def't's Ex. 16.

I offer in evidence an act entitled "An Act in Relation to the Taxation of Lands Granted to the St. Paul & Pacific Railroad Company," approved March 4, 1865. Received in evidence and marked Def't's Ex. 17.

I offer in evidence a certified copy of the resolution adopted and filed by the St. Paul & Pacific Railroad Company accepting the acts of March 2 and March 4, 1865. Received in evidence and marked Def't's Ex. 18.

I offer in evidence a certified copy of the acceptance by the First Division of the St. Paul & Pacific Railroad Company of the Act of March 4, 1865. Received in evidence and marked Def't's Ex. 19.

I offer in evidence an Act entitled "An Act to Amend the Charter of the St. Paul & Pacific Railroad Company," approved March 2, 1867. Received in evidence and marked Def't's Ex. 20.

I offer in evidence an Act entitled "An Act to Authorize the First Division of the St. Paul and Pacific Railroad Company to extend its branch line from St. Cloud, via Sauk Centre and Alexandria, to the Red River of the North, approved March 6, 1869. Received in evidence and marked Def't's Ex. 21.

I offer in evidence an Act to Authorize the first Division
26 of the St. Paul & Pacific Railroad Company to Locate, Extend and Construct its Main line from its Present Authorized Terminus to the Northern Boundary of the State of Minnesota, approved Feb. 18, 1870. Received in evidence and marked Def't's Ex. 22.

I offer in evidence an Act to Authorize the First Division of the St. Paul & Pacific Railroad Company to Construct a Branch from some Point on its Branch Line, to Princeton, in the County of

Mille Lacs, approved March 5, 1870. Received in evidence and marked Def't's Ex. 23.

I offer in evidence an Act entitled, "An Act to Authorize the First Division of the St. Paul & Pacific Railroad Company, to Construct a Branch Line from Some Point in Meeker or Wright Counties, to the Village of Hutchinson, in McLeod County, approved March 3, 1876. Received in evidence and marked Def't's Ex. 24.

I offer in evidence an Act entitled, "An Act to Amend Chapter 201 of the Special Laws of 1877, entitled 'An Act to Provide for the Completion of the Lines of Railroad commonly known as the St. Paul & Pacific Extension lines,'" approved March 9, 1878. Received in evidence and marked Def't's Ex. 25.

I offer in evidence a certified copy of the trust deed executed by the First Division of the St. Paul & Pacific Railroad Company to George L. Becker, Horace Thompson and George T. M. Davis, dated October 1st, 1865, conveying the branch line and other matters. Received in evidence and marked Def't's Ex. 26.

27 I offer in evidence a certified copy of Sheriff's Certificate of foreclosure under the mortgage dated October 1, 1865, the foreclosure being made in May, 1879. Received in evidence and marked Def't's Ex. 27.

I offer in evidence a certified copy of the statement adopted and filed by the St. Paul, Minneapolis & Manitoba Railway Company pursuant to the act of March 6, 1876, entitled "An Act to amend Title 1 of Chap. 34 of the General Statutes relating to Corporations." Received in evidence and marked Def't's Ex. 28.

I offer in evidence a certified copy of the deed executed to the St. Paul, Minneapolis & Manitoba Railway Company by the purchasers at the foreclosure sale under the mortgage of October 1, 1865, this being dated June 18, 1879. Received in evidence and marked Def't's Ex. 29.

I offer in evidence a certified copy of a trust deed executed by the First Division of the St. Paul & Pacific Railroad Company to George L. Becker, Horace Thompson and Samuel J. Tilden, dated July 1, 1868, conveying to the trustees the so-called main line. Received in evidence and marked Def't's Ex. 30.

I offer in evidence a certified copy of the Sheriff's Certificate of foreclosure sale under the mortgage last above described, the foreclosure having taken place in June, 1879. Received in evidence and marked Def't's Ex. 31.

28 I offer in evidence a certified copy of a Trust Deed executed by the St. Paul & Pacific Railroad Company to Horace Thompson, George L. Becker and Wm. G. Moorhead, dated April 1, 1871, conveying to the trustees named the so-called extension line from St. Cloud to St. Vincent. Received in evidence and marked Def't's Ex. 32.

I offer in evidence a certified copy of the Master's Certificate of Sale under the mortgage last above described, to the St. Paul, Minneapolis & Manitoba Railway Company of the properties in that mortgage described and conveyed, the certificate being dated June 21, 1879. Received in evidence and marked Def't's Ex. 33.

I offer in evidence a certified copy of the judgment roll in the case of the First Division of the St. Paul & Pacific Railroad Company against Frank M. Parcher, county treasurer, and Henry Kreis, county auditor of Wright county, particularly the complaint, the demurrer of the defendants, the mandate of the Supreme Court, and the final judgment in the action. Received in evidence and marked Def't's Ex. 34.

I offer in evidence in connection with the foregoing a certified copy of the record and opinion in the Supreme Court in the same case. Received in evidence and marked Def't's Ex. 35.

I next offer in evidence a certified copy of the record, including the judgment roll, in the lower court, and the opinion of the Supreme Court in the case entitled, "In the Matter of Proceedings to Enforce Payment of Taxes Remaining Delinquent on the First Monday of January, 1886, for the County of Stevens, State
29 of Minnesota." This was a case that was certified to the Supreme Court by the lower court. Received in evidence and marked Def't's Ex. 36.

I next offer in evidence a certified copy of the record in the lower court and the opinion of the Supreme Court in the case of the County of Traverse *vs.* The St. Paul, Minneapolis & Manitoba Railway Company, being another tax case, involving taxes. Received in evidence and marked Def't's Ex. 37.

I next offer in evidence an Act to Incorporate the Minneapolis & St. Cloud Railroad Company, approved March 1, 1856. Received in evidence and marked Def't's Ex. 38.

I next offer in evidence an Act to amend an Act entitled, "An Act to Incorporate the Minneapolis & St. Cloud Railroad Company, approved March 1, 1856, and to repeal certain portions of an Act amending the Charter of said Company," passed February 23, 1864, approved February 28, 1865. Received in evidence and marked Def't's Ex. 39.

I next offer in evidence an Act entitled "An Act to Amend the Charter of the Minneapolis & St. Cloud Railroad Company, approved March 2, 1870. Received in evidence and marked Ex. 40.

The defendant then rested.

The plaintiff also rested.

The case was then argued to the Court by Mr. Stone on behalf of the plaintiff, and by Mr. Begg on behalf of the defendant, and the Court thereupon took the case under advisement.

30 DEFENDANT'S EXHIBIT 1.

(Title of Cause.)

Stipulation of Facts.

Subject to the right of either party to object to the admission in evidence on the ground that they or any of them are unconstitutional and void, of the laws hereinafter referred to, it is hereby stipulated

and agreed by and between the above named plaintiff, State of Minnesota, and the above named defendant, Great Northern Railway Company, by their respective attorneys, that the following facts, whether alleged in the pleadings herein or not, shall, upon the trial of the issues of this action and for all the purposes thereof, be taken and deemed to be true, and said parties hereby admit, subject to the reservation above named, that the facts hereinafter stated are true.

I.

The defendant is a railway corporation of the State of Minnesota, duly organized under an act of the Territory of Minnesota entitled, "An act to incorporate the Minneapolis and St. Cloud Railroad Company," approved March 1, 1865, and acts amendatory thereof and supplemental thereto.

II.

The Eastern Railway Company of Minnesota is a corporation of the State of Minnesota, duly organized in the year 1887, under an act of the Territory of Minnesota entitled, "An act to incor-
31 porate the Minneapolis and St. Cloud Railroad Company," approved March 1, 1865, and acts amendatory thereof and supplemental thereto, and since the first day of May, 1902, and for a long time prior thereto, has owned, subject to the lease hereinafter described, the following lines of railway:

A line of railway extending from Coon Creek, Minnesota, by way of Brook Park and Hinckley, in said state, to the boundary line between the states of Minnesota and Wisconsin, near Foxboro, in said latter state.

A line of railway extending from the boundary line between the states of Minnesota and Wisconsin, near Boylston, in said latter state, westerly to Fosston, in the State of Minnesota.

A line of railway extending from Crookston, Minnesota, to Ellis, in said state.

A line of railway extending from Swan River, Minnesota, to Virginia, in said state.

Said Eastern Railway Company of Minnesota did, by instrument in writing dated the 1st day of May, 1902, lease to the defendant for the term of ninety-nine years from and after said date, all the lines of railway described and set forth hereinabove in this division II, and said defendant did, on May 1st, 1902, enter into possession of said lines of railway so leased, and has ever since said first day of May, 1902, maintained and operated said lines of railway under and by virtue of said lease.

32 III.

Said St. Paul, Minneapolis and Manitoba Railway Company, a corporation of the State of Minnesota, organized and existing as hereinafter stated, did, on the first day of February, 1890, and for a long time prior thereto, own, and ever since has owned, subject to the terms of the instrument hereinafter described, the following

lines of railway in the State of Minnesota, which lines of railway had been duly and lawfully constructed by said St. Paul, Minneapolis and Manitoba Railway Company and its predecessors in interest:

1. A line of railway extending from St. Paul, via St. Anthony (now East Minneapolis) to Breckenridge, in said state, hereinafter referred to as the Main Line; said line is 217 miles in length. The construction of said line was commenced by the St. Paul and Pacific Railroad Company in 1862. The St. Paul and Pacific Railroad Company completed that part of said line extending from St. Paul to St. Anthony, a distance of 10 miles, on July 2, 1862. The remainder of said line was completed by the First Division of the St. Paul and Pacific Railroad Company; the entire line being completed to Breckenridge October 15, 1871.

2. A line of railway extending from a connection with the last named line at St. Anthony (now East Minneapolis) Minnesota, along the east bank of the Mississippi River to Sauk Rapids, in said state, hereinafter referred to as the Branch Line. Said Branch Line is 66.4 miles in length. Its construction from a connection with said Main Line at St. Anthony was commenced by the First Division of the St. Paul and Pacific Railroad Company in 1864, and was completed from said connection to Elk River, a distance of 29 miles, and placed in operation, November 7, 1864. The entire line to Sauk Rapids was completed by said company July 1, 1867.

33

3. A line of railway extending from a connection with said last named line at East St. Cloud, Minnesota, by way of St. Cloud, Melrose, Alexandria, Barnesville and Crookston, to St. Vincent, in said state, hereinafter referred to as the Extension Line. The total length of said line is 319.19 miles. Its construction was commenced by the St. Paul and Pacific Railroad Company in 1872, and was completed from East St. Cloud to Melrose, Minnesota, a distance of 32 miles, November 1, 1873. That part of said line extending from Melrose to Barnesville was completed in the year 1879; and that part from Crookston to St. Vincent was completed in the year 1878. The remainder of said line was completed in 1879; all of said line having been constructed and completed by the St. Paul and Pacific Railroad Company prior to the date of the foreclosures hereinafter referred to.

4. A line of railway extending from a connection with said Main Line at Osseo Junction, in Minneapolis, Minnesota, along the west bank of the Mississippi River to St. Cloud, in said state; said line being 66.33 miles in length, and having been constructed and completed by the St. Paul, Minneapolis and Manitoba Railway company in the years 1881 and 1882.

34

5. A line of railway extending from a connection with said Branch Line at Elk River, Minnesota, by way of Princeton to a point of connection with the line next below described, at Milaca, in said state. Said line is 31.80 miles in length, and was constructed and completed by the said St. Paul, Minneapolis and Manitoba Railway Company in the year 1886.

6. A line of railway extending from a connection with said Branch Line at East St. Cloud, Minnesota, to Hinckley, in said state. Said

line is 66.38 miles in length, and was constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1882.

7. A line of railway extending from a connection with said Extension Line at St. Cloud, Minnesota, to a connection with said Main Line at Willmar, Minnesota. Said Line is 55.70 miles in length, and was constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the years 1885 and 1886.

8. A line of railway extending from a connection with said Extension Line at Sauk Center, Minnesota, to Park Rapids, in said state. Said line of railway being 90.60 miles in length; that part of said line extending from Sauk Center to Eagle Bend, 25.47 miles in length, was constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1882; that part of said line extending from said Eagle Bend to said Park
35 Rapids, 54.82 miles in length, was constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1891.

9. A line of railway extending from a connection with said Extension Line at Fergus Falls, Minnesota, to Pelican Rapids, in said state; said line being 21.65 miles in length, and having been constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1881.

10. A line of railway extending from a connection with said Main Line near Wayzata, Minnesota, to Hutchinson, in said state; said line being 43.90 miles in length and having been constructed and completed by the St. Paul, Minneapolis and Manitoba Railway Company in the year 1886.

11. A line of railway extending from a connection with said Main Line at Morris, Minnesota, to Brown's Valley, in said state; said line being 48.60 miles in length, and having been constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1881.

12. A line of railway extending from a connection with said Main Line at Breckenridge, Minnesota, by way of Moorhead, and Halstad, to Crookston, in said state; said line of railway being 114 miles in length, of which 107 miles are located within the state of Minnesota. That part of said line extending from Breckenridge, Minnesota, to Moorhead, was constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1887. That part of said line extending from Moorhead to
36 Halstad, in the state of Minnesota, was constructed and completed by the said St. Paul, Minneapolis and Manitoba Railway Company in the year 1883. That part of said line extending from said Halstad to said Crookston was completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1886.

13. A line of railway extending from a connection with said Extension Line at Crookston, Minnesota, to East Grand Forks, in said state; said line being 23.5 miles in length, and having been com-

pleted by the said St. Paul, Minneapolis and Manitoba Railway Company in the year 1879.

14. A line of railway extending from a connection with said Extension Line at Barnesville, Minnesota, to a connection with said last named line at Moorhead, in said state; said line being 22.79 miles in length, and having been constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1880.

15. A line of railway extending from a connection with said Extension Line at Crookston, Minnesota, to Fosston, in said state; said line being 46.08 miles in length and having been constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1888.

16. A line of railway extending from a connection with said Main Line at Benson, Minnesota, westerly to the boundary line between the states of Minnesota and South Dakota, said line being 45.92 miles in length, and having been constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1887.

37 17. A line of railway extending from a connection with said Extension Line at Evansville, Minnesota, to a connection with said Main Line at Tintah, in said state. Said line being 32.03 miles in length, and having been constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1887.

18. A line of railway extending from a connection with said Extension Line at Shirley, Minnesota, to St. Hilaire, Thief River Falls and Red Lake Falls, in said state; said line having a total length of 40.95 miles. Of said line that part extending from said Shirley to said St. Hilaire, 21.55 miles in length, was constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1882. The remainder of said line was constructed and completed by the said St. Paul, Minneapolis and Manitoba Railway Company in the year 1892.

19. A line of railway extending from a connection with said Main Line at Yarmouth, Minnesota, to the boundary line between the states of Minnesota and North Dakota, a distance of about 10 miles; which line was constructed and completed by said St. Paul, Minneapolis and Manitoba Railway Company in the year 1888.

A plat showing said lines of railway in red is hereto attached, marked "A" and hereby made a part hereof.

The said St. Paul, Minneapolis and Manitoba Railway Company did, on the first day of February, 1890, by an instrument in
38 writing dated that day, lease and demise unto the defendant for a term of nine hundred and ninety-nine years from and after said date, all the said lines of railway hereinabove in this Division III described together with all the rights and franchises appertaining thereto, and said defendant did on the said first day of February, 1890, enter into possession of the said lines of railway so leased to it, and has ever since said first day of February, 1890,

maintained and operated the said lines of railway under and pursuant to said lease; the plaintiff herein claiming that said instrument dated February 1, 1890, was in effect a sale and not a lease.

A true copy of said instrument is hereto attached, marked Exhibit "B."

IV.

The said lines of railway so owned by the said St. Paul, Minneapolis and Manitoba Railway Company and leased by it to the defendant as hereinabove stated, are the same lines, including branches thereof, formerly owned exclusively by the Minnesota and Pacific Railroad Company, the St. Paul and Pacific Railroad Company, and the First Division of the St. Paul and Pacific Railroad Company, together with certain branches thereof duly and lawfully constructed (under authority given by the laws of the state) by said St. Paul, Minneapolis and Manitoba Railway Company.

39 V.

The said Minnesota and Pacific Railroad Company was chartered and created a corporation by Chapter 1 of an act of the Legislative Assembly of the Territory of Minnesota entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections in the State of Alabama to aid in the construction of a certain railroad in said state,' and granting certain lands to railroad companies therein named," approved May 22, 1857. By said act and acts amendatory thereof and supplemental thereto, the Minnesota and Pacific Railroad Company and its successors in interest were authorized to construct and operate certain lines of railroad in said acts named, and branches thereof.

In and by said act of May 22, 1857, it was provided, in section 18 thereof, in regard to the taxation of said Minnesota and Pacific Railroad Company and its property, as follows:

"SEC. 18. In consideration of the grants, privileges and franchises herein conferred on the said Minnesota and Pacific Railroad Company, the said company shall and will, on or before the first day of March in each year, pay into the Treasury of the Territory or future state, three per centum of the gross earnings of the said railroad, for the year ending on the last day of the preceding December,

40 in lieu of all taxes and assessments whatever: and for the purpose of ascertaining the said earnings an accurate account shall be kept by said company of all receipts and expenditures on account of the operation of said railroads, and abstracts thereof shall be furnished by said company to the Treasurer of the Territory or State, on or before the first day of February in each year, the truth of which shall be verified by the affidavits of the Secretary and Treasurer of said company; and for the purpose of ascertaining the truth of said affidavits, and the correctness of such abstracts, full power is vested in the Governor or any other person appointed as may be by law prescribed, to examine the books and papers of said company,

and to examine under oath the officers, agents and employés of said company, and other persons, and if any person so examined by the governor or other authorized person, shall knowingly and wilfully swear falsely concerning the matters aforesaid, every such person is hereby declared to have committed perjury; and for securing to the Territory or State the payment of the aforesaid percentum, it is hereby declared that the State shall have a lien upon the railroads of the said company, and upon all other property, estate and effects of the said company, whether real, personal or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company. The first payment shall be made on the first day of March next after fifty miles of said railroad shall be completed, and such payment shall be in lieu
11 of all taxes and in full of all claims of the Territory or State for the grant hereby made, and in consideration of such annual payments the said company shall be forever exempt from all assessments and taxes whatever by the Territory or State which shall succeed the Territory, or by any county, city, town, village or other municipal authority in the Territory or State upon all stock in the said Minnesota and Pacific Railroad Company, whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal or mixed, held by said company, and said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company shall be exempt from all taxation till sold and conveyed by said company."

The Minnesota and Pacific Railroad Company duly accepted said act of May 22, 1857, within the time and in the manner required by section 12 thereof, and began the construction of the lines of railway in said act described. Thereafter and on or about the 31st day of July, 1858, it executed and delivered to Elon Farnsworth and others, as trustees, a mortgage covering the property and rights therein described, which mortgage bore date July 31st, 1858. Thereafter on the 25th day of October, 1858, the said Minnesota and Pacific Railroad Company did execute and deliver to the State of Minnesota an indenture wherein and whereby said Minnesota and Pacific Railroad Company did pledge unto the said State of Minnesota the net earnings or net profits of its said railroad, in compliance with
12 section 10 of Article IX of the Constitution of the State of Minnesota adopted April 18, 1858, and the said Minnesota and Pacific Railroad Company did, on the 23rd day of November, 1858, execute and deliver unto the State of Minnesota a conveyance of the first two hundred and forty sections of land, free from all prior incumbrances, which the said Minnesota and Pacific Railroad Company was authorized to sell; said conveyance being made in the form required by and in compliance with said section 10 of Article IX of the Constitution of the State of Minnesota.

Thereafter, on the 27th day of November, 1858, it executed a supplement to said mortgage to the said Elon Farnsworth and others, which said supplement bore date November 27, 1858. It failed to complete said lines of railway and made default in the conditions of said mortgage and supplement hereinabove described, and thereupon

said mortgage was duly foreclosed by sale at public auction pursuant to advertisement as in said mortgage and supplement provided. Said sale was made on the 23rd day of June, 1860, and at said foreclosure sale the State of Minnesota did purchase the property, franchises, privileges and immunities in said mortgage described. Thereafter on the 8th day of March, 1861, the Legislature of the State of Minnesota did enact a law entitled, "An act to facilitate the construction of the Minnesota and Pacific Railroad," approved March 8, 1861. Said Minnesota and Pacific Railroad Company failed to perform the conditions by said act of March 8, 1861, required to be by it
43 performed. Said State did continue thereafter to so own and hold the same, until the 10th day of March, 1862. Upon the 10th day of March, 1862, by an act of the Legislature of the State of Minnesota approved that day, entitled, "An act to facilitate the construction of the Minnesota and Pacific Railroad and to amend and continue the act of incorporation relating thereto," all the rights, benefits, immunities, property, franchises and interests of said Minnesota and Pacific Railroad Company so acquired and held by the State of Minnesota as hereinabove stated, were granted and conveyed (insofar as the state could lawfully grant and convey the same) unto Dwight Woodbury and other persons there named, their associates and successors, as a corporation by the name of the St. Paul and Pacific Railroad Company. Said corporation is the same corporation as that hereinabove referred to by said name St. Paul and Pacific Railroad Company. Said St. Paul and Pacific Railroad Company accepted said grant.

VI.

In the year 1864, in and by proceedings duly had pursuant to the provisions of a public law of the State of Minnesota entitled "An Act to amend the charter of the St. Paul and Pacific Railroad Company," approved February 6, 1864, the said First Division of the St. Paul and Pacific Railroad Company was duly organized and incorporated and became the owner of the lines of railway hereinbefore designated as the Main Line and the Branch Line, and became possessed
44 of and entitled to use, enjoy and exercise, and did use, enjoy and exercise all the rights, benefits, privileges, property, franchises, powers and interests of the Minnesota and Pacific Railroad Company and of the St. Paul and Pacific Railroad Company belonging or pertaining to said Main Line and to said Branch Line so far as the same had been acquired by the said State of Minnesota by virtue of said purchase at said mortgage foreclosure sale and said act of March 8, 1861, and thereafter conveyed and granted by said State of Minnesota to said St. Paul and Pacific Railroad Company.

The organization of the said First Division of the St. Paul and Pacific Railroad Company and its right and title to said lines of railroad, lands, franchises, and immunities, were duly confirmed (in so far as they could be confirmed) in said company in and by a public act of the State of Minnesota approved February 6, 1866, entitled, "An Act to legalize and confirm the organization, acts and proceedings of the First Division of the St. Paul and Pacific Railroad

Company and in relation to the charter and powers of said company." Said First Division of the St. Paul and Pacific Railroad Company duly accepted said act.

Between 1862 and 1871 the St. Paul and Pacific Railroad Company and the First Division of the St. Paul and Pacific Railroad Company severally executed divers trust deeds and mortgages covering the said Main Line, Branch Line and Extension Line, according to the ownership of the same; each of said mortgages including, covering and conveying, *inter alia*, all corporate and other franchises connected with or relating to the said lines of railway, including the franchise to be a corporation, which, at the date of such mortgage was or which might thereafter be possessed or exercised by the company making the same.

45

VII.

On the second day of March, 1865, the Legislature of the State of Minnesota enacted a special law entitled, "An Act to aid and facilitate the completion of the St. Paul and Pacific Railroad and Branches," approved March 2, 1865.

On the 4th day of March, 1865, the Legislature of said state passed an act entitled, "An Act in relation to the taxation of lands granted to the St. Paul and Pacific Railroad Company," approved March 4, 1865.

On the 16th day of March, 1865, the said St. Paul and Pacific Railroad Company in and by one and the same instrument, accepted the terms of said acts of March 2, 1865, and March 4, 1865.

VIII.

The said St. Paul, Minneapolis and Manitoba Railway Company is a railway corporation formed and organized by the purchasers of said branch line of railway, at a sale thereof duly made on the 7th day of May, 1879, pursuant to a judgment duly entered in the District Court in and for the County of Ramsey and State of Minnesota in an action duly instituted to foreclose one of said mortgages covering the said Branch Line, to-wit: A mortgage for $2,800,000 made and executed by the First Division of the St. Paul and Pacific Railroad Company to George L. Becker, Horace Thompson and George T. M. Davis, trustees, which mortgage was dated October 1, 1865. Said sale so made under said mortgage, and the foreclosure thereof was, on the 10th day of June, 1879, duly confirmed by said court. Said purchasers duly met and organized as said St. Paul, Minneapolis and Manitoba Railway Company on the 23rd day of May, 1879, and said company, having thereafter on the 11th day of June, 1879, made, and on the 21st day of June, 1879, filed for record in the office of the Secretary of State the certificate required by an act approved February 6, 1876, entitled, "An Act to amend Title 1 of Chapter 34 of the General Statutes relating to corporations," became, since has been and now is a corporation of the State of Minnesota, possessed of all the railways, properties, rights and privileges conferred, conveyed and granted by said mortgage

46

hereinabove in this division VIII described, and by said act of February 7, 1876, and other laws of the State of Minnesota, unless by Exhibit "A" hereto attached, it sold and conveyed the same to the defendant herein. Provided, that the plaintiff, the State of Minnesota, shall not be held to have admitted that the immunity from taxation other than the per centum gross earnings tax was ever lawfully and validly granted to or possessed by any company other than the Minnesota and Pacific Railroad Company.

47 Thereafter, in the month of June, 1879, the said St. Paul, Minneapolis and Manitoba Railway Company duly purchased said Main Line and said Branch Line, and certain branches thereof, under decrees duly entered in the District Court in and for the County of Ramsey, State of Minnesota, in a suit instituted to foreclose said mortgages, and purchased and became the owner of said Extension Line with the branches thereof, under a decree of the United States Circuit Court in and for the District of Minnesota, in a suit to foreclose a mortgage thereon made by the St. Paul and Pacific Railroad Company, all of which sales were by said respective courts duly confirmed in the month of June, 1879.

Under and by virtue of said foreclosure proceedings and said sales thereunder, and such purchases by said St. Paul, Minneapolis and Manitoba Railway Company, the said St. Paul, Minneapolis and Manitoba Railway Company became the owner of said Main Line, Branch Line and Extension Line described in division III hereof, including that part of the line from Crookston to East Grand Forks extending from said Crookston to Fisher's Landing, and a branch line extending from Breckenridge to Barnesville, in the State of Minnesota, together with all the rights, privileges, immunities and franchises theretofore granted to or possessed by the corporations hereinbefore in Division VI hereof named, which executed the said mortgages or deeds of trust hereinbefore referred to, and

48 applicable and appurtenant to the railroads and property so purchased at said foreclosure sales, so far as the same were covered and conveyed by said mortgages, and covered and granted to or confirmed in said corporations by the laws aforesaid, or any of them.

The other of said lines of railway in Division III hereof described were built and constructed by said St. Paul, Minneapolis and Manitoba Railway Company since the month of June, 1879, as branches of said Main, Branch and Extension Lines. Said lines of railway and branches were long since constructed, completed and put in operation, and ever since the construction thereof have been by said St. Paul and Pacific Railroad Company, said First Division of the St. Paul and Pacific Railroad Company, and said St. Paul, Minneapolis and Manitoba Railway Company, and by the defendant as lessee of said last named company, continuously operated.

IX.

Said Minnesota and Pacific Railroad Company never paid any gross earnings taxes. Said St. Paul and Pacific Railroad Company

and said First Division of the St. Paul and Pacific Railroad Company at all times prior to the acquisition of their said lines of railway by said St. Paul, Minneapolis and Manitoba Railway Company as hereinbefore stated, paid into the treasury of the State of Minnesota taxes upon the gross earnings derived from the operation of said lines of railway from and after the completion of the first thirty miles thereof on November 7, 1864, as follows: Upon the
49 gross earnings derived from such of said railways as were completed and in operation during the first three years after said November 7, 1864, at the rate of one per centum per annum; upon the gross earnings derived from the operation of such of said railways as were completed and in operation during the next seven years, at the rate of two per centum per annum; and upon the gross earnings derived from the operation of said railways from and after November 7, 1874, at the rate of three per centum per annum.

Said St. Paul, Minneapolis and Manitoba Railway Company operated the said lines of railway, with the extensions and branches thereof, from the time it acquired the same in 1879 until February 1, 1890, when it leased the said lines to defendant as above stated. Beginning in the year 1883, it from time to time extended said lines of railway westerly into the states of North Dakota, South Dakota, Montana, Idaho and Washington. After the extension of its said lines westerly into said states, it kept a true and accurate account of the gross earnings derived by it from the operation of its said lines and each of them, separately, within the State of Minnesota, upon the basis and in the manner following: The gross earnings derived by it from all business and traffic of every nature transacted and conducted over each of its said lines of railway wholly within the state of Minnesota were credited as gross earnings on each such line in Minnesota. The gross earnings derived from demurrage, switching, storage, wharfage and dockage, depot
50 privileges, weighing, elevators and similar matters, were credited as local earnings within the state and of the respective lines of railway in and upon which the same were earned and accrued. The gross earnings on each item of traffic wholly within Minnesota which passed over more than one of its said lines in said state were divided between and credited to each line over which the same passed in the proportion that the number of miles of such line over which such item of traffic moved bore to the total number of miles the same moved over all such lines. The gross earnings on each passenger, on each shipment of freight, and on each item of other traffic carried, transported and conducted partly over said lines or any of them in the state of Minnesota and partly over the extensions thereof in other states westerly of Minnesota, were apportioned and credited as gross earnings from the operation of its said lines respectively, in Minnesota in the proportion which the number of miles of its said respective lines in Minnesota over which such passenger, shipment or other item of traffic was carried, transported or conducted bore to the total number of miles of its railways, both within and without said state over which the same

was carried, transported and conducted. The division of gross earnings on each separate interstate shipment of freight, each separate interstate passenger and each separate other item of interstate business from which earnings was derived was made on the said basis.

51 Said St. Paul, Minneapolis and Manitoba Railway Company at all times after the acquisition of said lines of railway by it in 1879, until February 1, 1890, paid unto the State of Minnesota three per centum of its gross earnings derived from the operation of its lines within the state of Minnesota, determined in the manner aforesaid.

Defendant from the first day of February, 1890, up to the first day of May, 1902, operated within the state of Minnesota only the said lines of the said St. Paul, Minneapolis and Manitoba Railway Company in division III hereof described. During all the times from February 1, 1890, up to May 1, 1902, said defendant kept a true and accurate account of the gross earnings derived by it from the operation of said lines of railway of the St. Paul, Minneapolis and Manitoba Railway Company within the state of Minnesota and each of them, separately, upon the basis and in the manner hereinabove stated to have been followed and observed by said St. Paul, Minneapolis and Manitoba Railway Company; and at all times paid gross earnings taxes upon such earnings to the state of Minnesota at the rate of three per centum per annum.

Since the first day of May, 1902, up to and including the year 1905, defendant has operated within the state of Minnesota the lines of railway of said St. Paul, Minneapolis and Manitoba Railway Company in division III hereof described, and the lines of railway of said Eastern Railway Company of Minnesota, in division II hereof described. Defendant has at all times kept true, accurate and

52 separate accounts of the gross earnings derived by it from the operation of said lines of said St. Paul, Minneapolis and Manitoba Railway Company, and of the gross earnings derived by it from the operation of said lines of said Eastern Railway Company of Minnesota, upon the basis and in the manner hereinabove stated, with the following addition: In the case of shipments, passengers or other items of traffic carried, transported or conducted within the state of Minnesota partly over said lines of said St. Paul, Minneapolis and Manitoba Railway Company and partly over said lines of said Eastern Railway Company of Minnesota, said defendant has apportioned and credited as gross earnings derived from the operation of said lines of said St. Paul, Minneapolis and Manitoba Railway Company within the state of Minnesota a percentage of the earnings on each such passenger, shipment of freight or other item of traffic equal to the percentage which the number of miles of the lines of the St. Paul, Minneapolis and Manitoba Railway Company over which such passenger, shipment or other item of traffic was carried, transported or conducted within the state of Minnesota bore to the total number of miles of the railways of both said St. Paul, Minneapolis and Manitoba Railway Company and of said Eastern Railway Company of Minnesota over which such passenger, shipment or

other item of traffic was carried, transported or conducted within said state.

The same basis of dividing the earnings between said lines
53 of said St. Paul, Minneapolis and Manitoba Railway Company and said lines of said Eastern Railway Company of Minnesota was applied in the case of earnings from business wholly local to Minnesota moving over the lines of both of said companies and to the Minnesota proportion of interstate earnings moving within the state of Minnesota over the lines of both of said companies.

Such division of interstate earnings and the apportionment thereof to the lines of railway of said St. Paul, Minneapolis and Manitoba Railway Company and said Eastern Railway Company of Minnesota within the state of Minnesota, made in the manner aforesaid, was at all times in strict accordance with the requirements made, given and enforced by the Railroad and Warehouse Commission of the State of Minnesota and the Treasurer and other officers of said state upon whom was devolved the duty of ascertaining the amount of the gross earnings derived by railway companies from the operation of railways within the State of Minnesota, and particularly the gross earnings derived by said St. Paul, Minneapolis and Manitoba Railway Company and defendant from the operation of said railways hereinabove described, and with the duty of collecting taxes due to the State of Minnesota upon such gross earnings; and said officers of the State of Minnesota have at all times insisted that for the purpose of determining and ascertaining the gross earnings derived by the said St. Paul, Minneapolis and Manitoba Railway Company and by defendant from the operation of the lines of the St. Paul, Minneapolis and Manitoba Railway Company within the State of
54 Minnesota, and derived from the operation of the lines of railway of the Eastern Railway Company of Minnesota, the interstate earnings derived from the operation of said lines of railway should be apportioned and credited to the lines in Minnesota in the manner and upon the basis hereinabove stated; and said basis and manner have been so enforced by said officers of the State of Minnesota for more than twenty years last past.

Neither the Railroad and Warehouse Commission nor the Governor, nor the Treasurer of said state, nor any other officer thereof have ever at any time complained of or objected to or suggested the impropriety or incorrectness of the method and basis of accounting aforesaid, and the officers of the said State of Minnesota have at all times for more than twenty years acquiesced in and insisted upon the adoption of said method and manner of accounting and crediting such gross earnings.

Defendant at all times since February 1, 1890, has paid unto the treasury of the State of Minnesota three per centum of the gross earnings derived by it from said lines of the said St. Paul, Minnesota and Manitoba Railway Company within the State of Minnesota, and has likewise at all times since the first day of May, 1902, paid unto the State of Minnesota three per centum upon the gross earnings derived by it from the operation of said lines of the Eastern Railway Company of Minnesota, except that since Chapter 253 of the General Laws

of 1903 became a law and effective, the defendant has paid
55 unto the State of Minnesota pursuant to said law four per centum upon the gross earnings derived by it from the operation of the lines of the said Eastern Railway Company of Minnesota within the State of Minnesota; the amount of such earnings being in each year determined in the manner and upon the basis hereinbefore stated.

The entire gross earnings derived by the defendant during the year 1905 from the operation of the said lines of railway operated by it within the State of Minnesota were the sum of $18,540,396.27. A true and accurate account of that part of said earnings derived by this defendant from the operation of the said lines of railway of the St. Paul, Minneapolis and Manitoba Railway Company during said year 1905, and of that part of said gross earnings derived by defendant from the operation of said lines of railway of the Eastern Railway Company of Minnesota during the said year 1905 has been by said defendant kept in the manner and upon the basis hereinbefore stated. The amount of the gross earnings derived by defendant from the operation of said lines of the Eastern Railway Company of Minnesota within the State of Minnesota during said year 1905, computed upon the basis and in the manner hereinbefore stated, was the sum of $6,466,658.02. Prior to the commencement of this action and within the time required by law the defendant did duly pay into the treasury of the State of Minnesota four per centum upon said gross earnings so derived by it during said year 1905 from the operation of the lines of the Eastern
56 Railway Company of Minnesota, to-wit: upon the sum of $6,466,658.02; the amount of the gross earnings tax so paid on account of said gross earnings from the lines of the Eastern Railway Company of Minnesota being the sum of $258,666.32.

The amount of the gross earnings derived by said defendant from the operation of said lines of the St. Paul, Minneapolis and Manitoba Railway Company within the State of Minnesota for said year 1905, computed upon the basis and in the manner hereinbefore stated, was the sum of $12,073,738.25. Said defendant did, prior to the commencement of this action and within the time required by law, pay into the treasury of the State of Minnesota the amount of three per centum on the said sum of $12,073,738.25, gross earnings so derived by it from the operation of said lines of said St. Paul, Minneapolis and Manitoba Railway Company; the amount of such payment being the sum of $362,212.15; making the total sum paid by defendant on account of the gross earnings derived by it from the operation of the said line of railway in divisions II and III hereof described $620,878.47.

The amount of gross earnings so credited for the year 1905, to the lines of said St. Paul, Minneapolis and Manitoba Railway Company within the State of Minnesota, upon the basis and in the manner hereinbefore stated, to-wit: the sum of $12,073,738.25, is made up as follows:

The amount of earnings derived during the year 1905 by said de-

fendant from traffic which within the State of Minnesota was
57 local to or passed over only the lines of the St. Paul, Minneapolis and Manitoba Railway Company, was $10,160,949.26.

The amount of earnings credited for the year 1905 to the lines of the St. Paul, Minneapolis and Manitoba Railway Company on the basis and in the manner hereinabove stated on business which within the State of Minnesota passed partly over the lines of said St. Paul, Minneapolis and Manitoba Railway Company and partly over said lines of said Eastern Railway Company of Minnesota, was the sum of $1,912,788.29.

Said amount of gross earnings credited to the lines of the St. Paul, Minneapolis and Manitoba Railway Company for the year 1905, to-wit: The sum of $12,073,738.25, was derived from the operation of the several lines of said St. Paul, Minneapolis and Manitoba Railway Company in the State of Minnesota as follows:

From business and traffic local to and transacted over said Main Line, the sum of $5,386,016.90.

From business and traffic local to and transacted over said Branch Line and said Extension Line, the sum of $3,459,126.96.

From business and traffic local to and transacted over said line extending from Barnesville to Moorhead, the sum of $96,781.05.

From business and traffic local to and transacted over said line extending from a connection with said Main Line at Osseo Junction, in Minneapolis, to St. Cloud, the sum of $345,807.43.

From business and traffic local to and transacted over said
58 lines of railway from East St. Cloud to Hinckley, Minnesota, and from Elk River to Milaca, the sum of $556,524.77.

From business and traffic local to and transacted over said line of railway extending from St. Cloud to Willmar, the sum of $364,709.81.

From business and traffic local to and transacted over said line extending from a connection with said Extension Line at Sauk Center to Park Rapids, the sum of $277,538.16.

From business and traffic local to and transacted over said line extending from a connection with said Extension Line at Fergus Falls to Pelican Rapids, the sum of $22,438.73.

From business and traffic local to and transacted over said line of railway extending from a connection with said Main Line near Wayzata, Minnesota, to Hutchinson, the sum of $56,252.69.

From business and traffic local to and transacted over said line extending from a connection with said Main Line at Morris, Minnesota, to Brown's Valley, the sum of $64,006.48.

From business and traffic local to and transacted over said line of railway extending from Breckenridge by way of Moorhead and Halstad, Minnesota, to Crookston, the sum of $235,562.64.

From business and traffic local to and transacted over said line from Crookston, Minnesota, to East Grand Forks, the sum of $375,568.07.

From business and traffic local to and transacted over said line extending from Crookston, Minnesota, to Fosston, the sum of $595,865.46.

From business and traffic local to and transacted over said
59 line extending from a connection with said Main Line at Benson, Minnesota, westerly to the boundary line between the states of Minnesota and South Dakota, the sum of $101,511.22.

From business and traffic local to and transacted over said line extending from a connection with said Extension Line at Evansville, Minnesota, to Tintah, the sum of $37,085.25.

From business and traffic local to and transacted over said line extending from a connection with said Extension Line at Shirley, Minnesota, to St. Hilaire, Thief River Falls and Red Lake Falls, the sum of $82,340.17.

From business and traffic local to and transacted over said line extending from a connection with said Main Line at Yarmouth, Minnesota, to the boundary line between the states of Minnesota and Northr Dakota, the sum of $16,602.46.

The sum of $120,737.38, alleged in the complaint herein to be due and unpaid and for which judgment is demanded is one per centum on the gross earnings so apportioned and credited by defendant to the lines within the State of Minnesota of the St. Paul, Minneapolis and Manitoba Railway Company and on which gross earnings a gross earnings tax has been paid at the rate of three per centum, as hereinabove stated.

X.

Said Minnesota and Pacific Railroad Company, said St. Paul and Pacific Railroad Company, said First Division of the St. Paul
60 and Pacific Railroad Company, said St. Paul, Minneapolis and Manitoba Railway Company, and said defendant, have, save as herein otherwise stated, fully complied with all the provisions of said act of March 2, 1865, in respect to the returns of gross earnings and the payment of gross earnings taxes thereon; and said companies and each of them have at all times since November 7, 1864, paid gross earnings taxes upon the earnings derived from the operation of said lines of railway at the rate and in the manner and at the times hereinabove stated, and have paid all such gross earnings taxes as the same accrued and became due and payable.

XI.

The St. Paul and Pacific Railroad Company and the First Division of the St. Paul and Pacific Railroad Company earned the land-grant made by the United States Government to aid in the construction of their railways, and such land grant was duly conveyed to and acquired by them, and such granted lands passed to the St. Paul, Minneapolis and Manitoba Railway Company under the foreclosures of the railways and properties of the St. Paul and Pacific Railroad Company and the First Division of the St. Paul and Pacific Railroad Company had in May and June, 1879. Of said land grant the St. Paul, Minneapolis and Manitoba Railway Company, owned on June 1, 1907, 143,745 acres, and still owns the same. The remainder of said land grant lands have been sold and disposed of by said St. Paul, Minneapolis and Manitoba Railway Company and its predecessors in interest.

Exhibit "A"

No 719
Gt. Nor. Ry. Co.
v
Minnesota
} p 62

61 XII.

Either party to this action may offer and introduce upon the trial thereof, such other and additional evidence not in conflict with the terms of this stipulation as to it may seem proper and advisable.

Nothing in this stipulation contained shall be taken as conclusive upon the validity or effect of any instrument or law referred to herein; and either party, notwithstanding any reference or characterization herein contained may attack the validity and question the effect of any such instrument or law so referred to; the validity and effect of the same and all thereof being left for the determination of the court from the contents thereof and the law applicable thereto: Provided, however, it is admitted without reservation that any and all mortgage foreclosure proceedings herein referred to were and are regular and valid and have transferred and conveyed to the purchasers at such foreclosure sales all the property and rights included in and granted by such mortgages.

EDWARD T. YOUNG,
Attorney General;
ROYAL A. STONE,
Attorneys for Plaintiff, State of Minnesota.
WM. R. BEGG,
Attorney for Defendant, Great Northern Railway Company.

(Here follows diagram marked page 62.)

63 EXHIBIT "B."

Indenture, made and entered into on February 1, A. D. 1890, by and between The Saint Paul, Minneapolis and Manitoba Railway Company, hereinafter referred to as the Manitoba Company, party of the first part, The Great Northern Railway Company, hereinafter referred to as the Northern Company, party of the second part, and the Central Trust Company of New York, hereinafter referred to as the Trustee, party of the third part.

Manitoba Co.'s Organization.

Whereas, The Manitoba Company is a railway corporation organized and existing under that certain act of the legislature of the late Territory of Minnesota, approved May 22, A. D. 1857, entitled "An Act to execute the trust created by an act of Congress entitled, 'An Act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said state, and granting certain lands to railroad companies therein named," and under divers subsequent acts of the legislatures of said territory and of the State of Minnesota, including an act of the legislature of said state approved March 7, A. D. 1881, entitled

"An Act confirming the organization and certain purchases
64 of the St. Paul, Minneapolis and Manitoba Railway Company, and in relation to the charter, powers, franchises and property of said company;" and

Whereas, by construction or purchase, the Manitoba Company has acquired, and now owns and operates, within the States of Minnesota, North Dakota, South Dakota and Montana, divers lines of railroad, extending between the points, and having approximately the mileage mentioned below, to-wit:

Railways of Manitoba Co.

Miles of Road under Operation February 1, A. D. 1890, Owned by the St. P., M. & M. Ry. Co.

	Miles.
St. Paul, Minn., to Barnesville, Minn.	217.32
State Fair Grounds Spur, Minn.	0.64
Osseo Junction, Minn., to St. Cloud, Minn., including north "Y"	63.07
Elk River, Minn., to Milaca, Minn.	31.80
St. Cloud, Minn., to Hinckley, Minn.	66.43
East St. Cloud, Minn., to Sauk Rapids, Minn.	2.14
St. Cloud, Minn., to Willmar Junction, Minn.	55.85
Sauk Centre, Minn., to Eagle Bend, Minn.	36.41
Fergus Falls, Minn., to Pelican Rapids, Minn.	21.65

	Carlisle Junction, Minn., to Elizabeth, Minn	3.52
	Minneapolis Junction, Minn., to East Minneapolis, Minn.	0.70
	East Minneapolis, Minn., to Breckenridge, Minn.	204.12
65	Minnetonka North Shore Line, Minn	5.93
	Hutchinson Junction, Minn., to Hutchinson, Minn	53.13
	Morris, Minn., to Brown's Valley, Minn	46.68
	Tintah Junction, Minn., to Ellendale, N. Dak	104.32
	Rutland Junction, N. Dak., to Aberdeen, S. Dak	64.00
	Barnesville, Minn., to St. Vincent, Minn	170.95
	St. Vincent Junction Switch to Boundary Line	2.62
	St. Vincent Junction Switch to End of Track, via Old Depot	2.12
	Shirley, Minn., to St. Hilaire, Minn	21.55
	Barnesville Junction, Minn., to Grand Forks Junction, N. Dak., via Moorhead and Fargo	98.14
	Grand Forks, N. Dak., to Boundary Line	80.94
	Moorhead Junction, Minn., to Halstad, Minn	34.09
	Breckenridge, Minn., to Larimore Junction, N. Dak., via Portland	132.00
	Everest, N. Dak., to Portland Junction, N. Dak., via Mayville	50.44
	Ripon, N. Dak., to Hope, N. Dak	29.50
	Crookston Junction, Minn., to Minot, N. Dak	230.33
	Park River Junction, N. Dak., to Langdon, N. Dak	73.88
	Rugby Junction, N. Dak., to Bottineau, N. Dak	38.66
	Evansville, Minn., to Tintah Junction, Minn	32.03
66	Minot, N. Dak., to South Side Sun River, Mont.	549.25
	Johnstown Junction to Junction with Sand Coulee Branch, Great Falls, Mont	3.40
	West Side Branch from Great Falls, Mont	0.77
	Great Falls, Mont., to Smelter	5.33
	Wahpeton, N. Dak., to Moorhead, Minn	12.91
	Church's Ferry, N. Dak., to St. John, N. Dak	55.21
	Carman, Minn., to Fosston, Minn	44.69
	North St. Cloud Branch, Minn	2.53
	Benson, Minn., to Watertown, S. Dak	91.62
		2,770.40

Depots, Yards, etc.

Together with depots, yards, side tracks, engine houses, machine shops, water supply plant and other appurtenances, including a general office building, with necessary furniture and fixtures, in the city of St. Paul, State of Minnesota; and

Equipment of Manitoba Co.

Whereas, The Manitoba Company has acquired, and now owns, for use in the operation of its said lines of railway, motive power and rolling stock as described below, to-wit:

Locomotive engines	259

Passenger Equipment.

Sleeping cars	30
Colonist sleeping cars	8
67 Dining cars	6
Coaches	100
Combination passenger and baggage cars	23
Combination baggage, mail and express cars	54
Business and pay cars	3
Total passenger equipment	224

Freight and Work Equipment.

Box cars	5,839
Flat and coal cars	1,553
Stock cars	478
Hays cars	6
Furniture cars	10
Refrigerator cars	57
Caboose and boarding cars	171
Derrick and tool cars	21
Steam shovels	2
Rotary snow plows	2
Pile drivers	3
Ditching cars	1
Dump cars and Peterler cars	109
Flangers	1
Total freight and work equipment	8,253

Machinery, Tools, etc.

Also a large quantity of machinery and shop tools, in its machine shops, and roundhouses, and of hand cars, push cars and other implements and tools designed and kept for use in connection with the construction, maintenance and repair of its tracks and structures; and also quantities of engineering, surveying and draughting instruments and apparatus; and

68 *Stock of Material.*

also quantities of materials procured and kept for use in maintaining and repairing its tracks, structures, motive power, rolling stock and other equipment and appliances; and also quantities of fuel procured and kept for use in carrying on the said company's various operations; of which machinery, shop tools and implements, hand cars, push cars, track tools and implements, engineering and surveying instruments and apparatus, materials and fuel.

Inventories.

Inventories have been made in duplicate, one copy whereof has been delivered to the Northern Company, and the other retained by the Manitoba Company; and

Land Grant of Manitoba Co.—Land Contracts—Liens On

Whereas, The Manitoba Company is also owner of large quantities of lands, granted to it by the State of Minnesota, as trustee of the United States, to aid in the construction of certain of its lines of railway situated within said state, and also of a large number of contracts with divers purchasers from the said company of lands of like character, on which contracts large sums of money remain owing; which lands, and certain of which contracts, are subject to the lien of the mortgage bearing date June 21, A. D. 1879,
69 executed by the said company to John S. Kennedy, John S. Barnes, and James A. Roosevelt, as trustees, commonly known as the Manitoba Company's First Mortgage, and also to the lien of that certain other mortgage bearing date May 1, A. D. 1883, executed by the Manitoba Company to the Central Trust Company of New York, as trustee, commonly known as the Manitoba Company's Consolidated Mortgage; the residue of said contracts, and the right to the moneys due and to grow due thereon, being held and owned by the Manitoba Company free and clear from liens or incumbrances; and

Eastern Ry. Co.

Whereas, The Eastern Railway Company of Minnesota is a railway company organized and existing under the laws of the States of Minnesota and Wisconsin, and owns and operates a

Contract with Manitoba Co.—Bonds of Eastern Ry. Co.

line of railway extending from Hinckley, in the State of Minnesota, to West Superior, in the State of Wisconsin, a distance of about seventy (70) miles, together with grain elevators, yards, docks, warehouses, and other terminal facilities in West Superior, and sundry terminal facilities in Duluth, in the State of Minnesota, and an equipment of engines, cars and tools, for operating said road; and by a contract between itself and the Manitoba Company, bearing date January 2, A. D. 1888, has acquired and enjoys the right, subject to the rentals, terms, conditions and limitations in said
70 contract particularly set forth, for and during the period of ninety-nine (99) years from and after September 1, A. D. 1888, to run its engines and trains, in the transaction of its business, over the lines of railroad of the Manitoba Company between Hinckley and St. Paul and Minneapolis, so as to form a continuous railway route between St. Paul and Minneapolis and West Superior and Duluth; and has, by the same contract, conferred upon the

Manitoba Company the right, subject to the rentals, terms, conditions and limitations in said contract particularly set forth, for and during the same period aforesaid, to run its engines and trains over the Eastern Railway Company's said line from Hinckley to West Superior and Duluth; and has, for the purpose of building and equipping its said railroad and terminal facilities, and of acquiring grounds therefor, issued its bonds, maturing April 1, A. D. 1908, secured by first mortgage of its said railway and terminals, and the equipment and appurtenances thereof, to the Central Trust Company of New York, as trustee, and negotiated the same, to the amount of four million two hundred and fifty thousand dollars ($4,250,000) principal, with interest at the rate of five (5) per cent. per annum, payable semi-annually, payment of the principal and interest

71 *Guaranty of Bonds—Stock of Eastern Ry. Co.*

of said bonds having, for a lawful consideration, been guaranteed by the Manitoba Company, all of said bonds now being outstanding, in the hands of the public; and has, for a lawful consideration, issued, sold and delivered, to the Manitoba Company, as fully paid, fifty thousand (50,000) shares in its capital stock, of one hundred dollars ($100) each, the said bonds and shares of stock being all the bonds and stock of said company now outstanding; and

W. & S. F. Ry. Co.—Bonds of—Stock of.

Whereas, The Willmar and Sioux Falls Railway Company is another railway corporation, organized and existing under the laws of the States of Minnesota and South Dakota, and has constructed and owns a line of railway extending from Willmar, in the State of Minnesota, to Sioux Falls, in the State of South Dakota, and having an approximate length of one hundred and forty-six and ninety-one one-hundredths (146.91) miles, together with depots, yards, side tracks, water supply plant and other appurtenances; and has, for a lawful consideration, issued, sold, and delivered to the Manitoba Company its negotiable bonds, maturing June 1, A. D. 1938, and secured by a first mortgage to the Central Trust Company of New York, as trustee, of all its said constructed railroad and appurtenances, to the

72 amount of two million, six hundred and twenty-five thousand dollars $2,625,000) principal, with interest thereon at the rate of six (6) per cent. per annum, payable semi-annually; and has, also, for a lawful consideration, issued, sold, and delivered to the Manitoba Company, as fully paid, fifteen thousand (15,000) shares, of one hundred dollars ($100) each, in its capital stock; the said bonds and shares of stock being the only bonds and stock of the said company now outstanding; and

D. W. & P. Ry. Co.—Bonds of—Stock of.

Whereas, The Duluth, Watertown and Pacific Railway Company is another railway corporation, organized and existing under the laws of the State of South Dakota, and has constructed and owns a

line of railway, extending from Watertown to Huron, in said state, and having an approximate length of sixty-nine and eightyfour one-hundredths (69.84) miles, together with depots, yards, side tracks, water supply plant and other appurtenances; and has, for a lawful consideration, issued, sold and delivered to the Manitoba Company its negotiable bonds, maturing June 1, A. D. 1938, secured by a first mortgage to the Central Trust Company of New York, as trustee, of all its said constructed railroad and appurtenances, to the amount of one million three hundred and seventy-five thousand dollars ($1,375,000) principal, with interest thereon at the rate of six (6) per cent. per annum, payable semi-annually, and has, also, for a lawful consideration, issued and delivered to the Manitoba
73 Company, as fully paid, seven thousand three hundred (7,300) shares, of one hundred dollars ($100) each, in its capital stock; the said bonds and shares of stock being the only bonds and stock of the said company now outstanding; and

Mont. Cent. Ry. Co.

Whereas, The Montana Central Railway Company is a railway corporation, organized and existing under the laws of the State of Montana, and owns and operates a line of railroad extending from Great Falls to Butte, in said state, a distance of about one hundred and seventy-two (172) miles, with sundry branches having an additional approximate length of thirty-one and one-half (31½) miles of completed main track, and of forty (40) further miles of wholly or partly finished roadbed, and also with depots, stations, yards, side tracks, water supply plant and other appurtenances; and with an equipment of engines, cars and tools for the operation thereof; and has, for the purpose of constructing and

Bonds of—Guaranty of Bonds—Stock of.

equipping its said railroad and branches, issued its negotiable bonds, maturing July 1, A. D. 1937, secured by a first mortgage to the Central Trust Company of New York, as trustee, of its said railroad and branches, and the appurtenances and equipment thereof, and has negotiated the same to the amount of six million, five hundred thousand dollars ($6,500,000) principal, with interest at the rate
74 of six (6) per cent. per annum, the payment of the principal and interest of the said bonds having, for a lawful consideration, been guaranteed by the Manitoba Company; and has, for a lawful consideration, issued, sold and delivered to the Manitoba Company, as fully paid, fifty thousand (50,000) shares of one hundred dollars ($100) each, in its capital stock; the said bonds and stock being all the bonds and stock of the said railway company now outstanding, and the said shares of stock so transferred to the Manitoba Company being subject to the lien of the Manitoba Company's Montana Extensions Mortgage hereinafter mentioned; and

Northern S. S. Co.—Stock of.

Whereas, The Northern Steamship Company is a corporation, organized and existing under the laws of the State of Wisconsin, with

power to acquire, own and navigate vessels upon the "Great Lakes," so-called, and their connecting waters, and has acquired, and now owns, six (6) steamships, with the furniture and tackle thereof; and, for the purpose of raising funds to pay for the same, has issued, sold and delivered to the Manitoba Company, as fully paid, fifteen thousand (15,000) shares in its capital stock, of one hundred dollars ($100) each; the said stock being all the stock of said company now outstanding; no mortgage having ever been made, nor any bonds having ever been issued by said company; and

75 *Minn. Un. Ry. Co.—Bonds of—Guaranty of Bonds.*

Whereas, The Minneapolis Union Railway Company is a corporation, organized and existing under the laws of the State of Minnesota, having for its chief purposes the furnishing of passenger depot and other facilities in Minneapolis, Minnesota, to the several railway systems entering that place, and has constructed three (3) passenger stations within the corporate limits thereof, and about three and one-half (3½) miles of double track railway connecting said stations with the tracks of the Manitoba Company, and a stone arch viaduct across the Mississippi river, and has leased the right to the use of its plant and facilities to sundry railroad companies; and for the purpose of raising the necessary funds for acquiring right of way, and other grounds, for its said viaduct, tracks and stations, and for constructing such viaduct, tracks and stations, with their appurtenances, has issued its bonds, maturing July 1, A. D. 1922, to the aggregate amount of two million, seven hundred thousand dollars ($2,700,000), of which two million, one hundred and fifty thousand dollars ($2,150,000) bear interest at the rate of six (6) per cent., and the residue at the rate of five (5) per cent. per annum, payable semi-annually; all said bonds being secured by a first mortgage to the Central Trust Company of New York, as trustee, of all the property of the said Minneapolis Union Railway Company, and the payment of the principal and interest thereof having,
76 for a lawful consideration, been guaranteed by the Manitoba Company; and

Additional Issue of Bonds.

Whereas, It is provided, in substance, in the said mortgage securing the said bonds, that, for like purposes, additional bonds secured thereby, to the amount of three hundred thousand dollars ($300,000) principal, with interest at a rate not exceeding six (6) per cent. per annum, may be issued at the request of the board of directors of the Manitoba Company, provided a similar guaranty by the Manitoba Company of the principal and interest thereof be indorsed thereon prior to the issuance thereof; and

Railway Stocks Owned by Manitoba Co.

Whereas, The Manitoba Company has, for lawful considerations, acquired, and now holds and owns, the following mentioned other stocks, to-wit:

Minn. Un. Ry. Stock.

Five thousand (5,000) shares, of one hundred dollars ($100) each, in the capital stock of the Minneapolis Union Railway Company; the same comprising all the stock in said company now outstanding;

St. P. U. D. Stock.

Seven hundred (700) shares, of one hundred dollars ($100) each, in the capital stock of the Saint Paul Union Depot Company;

77 *Minn. Transfer Stock.*

Seventy (70) shares, of one hundred dollars ($100) each, in the capital stock of the Minnesota Transfer Railway Company;

Covered by Consolidated Mortgage.

All of which stocks of the Minneapolis Union Railway Company, of the Saint Paul Union Depot Company, and of the Minnesota Transfer Railway Company, are subject to the lien of the said mortgage bearing date on May 1, A. D. 1883, executed by the Manitoba Company to the Central Trust Company of New York, as trustee, and commonly known as the Manitoba Company's Consolidated Mortgage; and

Other Securities Owned by Manitoba Co.

Whereas, The Manitoba Company has acquired, for lawful considerations, and now owns, certain other stocks and bonds, described as follows, to-wit:

Fifty-six (56) shares, of one hundred dollars ($100) each, in its own capital stock;

Fourteen hundred and ninety (1490) shares, of one hundred dollars ($100) each, in the capital stock of the Climax Coal Company;

One hundred and sixty-seven (167) shares, of one hundred dollars ($100) each, in the capital stock of the Lake Superior Terminal and Transfer Railway Company;

78 Two thousand five hundred (2,500) shares, of one hundred dollars ($100) each, in the capital stock of the Sand Coulee Coal Company;

Fifteen hundred (1500) shares, of fifty dollars ($50) each, in the capital stock of the Saint Paul Foundry Company;

One hundred and sixteen (116) shares, of fifty dollars ($50) each, in the capital stock of the Fort Benton Bridge Company;

Six (6) bonds, for the principal sum of one thousand dollars ($1,000) each, with interest at the rate of four (4) per cent. per annum, issued by the Manitoba Company in pursuance of the provisions of the mortgage bearing date June 1, A. D. 1887, executed by said company to the Central Trust Company of New York, as

trustee, commonly known as the Montana Extension Mortgage of that company, and secured by said mortgage;

Seven hundred and fifty (750) bonds for the principal sum of one thousand dollars ($1,000) each, with interest at the rate of four and one-half (4½) per cent. per annum, issued by the Manitoba Company in pursuance of the said Consolidated Mortgage, and secured thereby;

Five hundred (500) bonds, for the principal sum of one thousand dollars ($1,000) each, with interest at the rate of six (6) per cent. per annum, issued by the Montana Central Railway Company in pursuance of the mortgage dated July 1, A. D. 1887, executed by that company to the Central Trust Company of New York, as trustee, and secured by said mortgage;

One hundred and nine (109) bonds, for the principal sum
79 of one thousand dollars ($1,000) each, bearing interest at the rate of five (5) per cent. per annum, issued by the Minnesota Transfer Railway Company, under and by authority of mortgage of its plant, properties and railways, to the Saint Paul Trust Company, as trustee, bearing date August 1, A. D. 1886;

One (1) bond, for the principal sum of one hundred dollars ($100), with interest at the rate of seven (7) per cent. per annum, issued by the Manitoba Company in pursuance of the mortgage dated June 21, A. D. 1879, executed by the Manitoba Company to John S. Kennedy, John S. Barnes and James A. Roosevelt, as trustees, commonly known as said company's First Mortgage, and secured by said mortgage;

Three hundred and four (304) bonds, for the principal sum of one hundred dollars ($100) each, with interest at the rate of five (5) per cent. per annum, issued by the County of Todd, State of Minnesota;

Twelve (12) bonds, for the principal sum of one thousand dollars ($1,000) each, with interest at the rate of six (6) per cent. per annum, issued by the village of Hutchinson, in the County of McLeod, State of Minnesota;

Three (3) bonds, for the principal sum of one thousand dollars ($1,000) each, and one (1) bond, for the principal sum of thirteen hundred dollars ($1,300), with interest at the rate of seven (7) per cent. per annum, issued by the town of Breckenridge, in the County of Wilkin, State of Minnesota;

Thirty (30) bonds, for the principal sum of one thousand
80 dollars ($1,000) each, with interest at the rate of six (6) per cent. per annum; issued by the County of Pipestone, State of Minnesota;

Two (2) bonds, for the principal sum of one thousand dollars ($1,000) each, with interest at the rate of six (6) per cent. per annum, issued by the town of Minnesota Falls, in the County of Yellow Medicine, State of Minnesota;

Two (2) bonds, for the principal sum of one thousand dollars ($1,000) each, with interest at the rate of six (6) per cent. per annum, issued by the town of Sandnes, in the County of Yellow Medicine, State of Minnesota; and

Land Contracts Free from Lien Owned by Manitoba Co.

Whereas, The Manitoba Company is the owner, free from the lien of its said First Mortgage, or of either or any of the other mortgages, heretofore made by it, of a large number of contracts heretofore made by it with divers persons, for the sale to them of tracts of its said granted lands, on which contracts there remain owing and unpaid, at this date, approximately the principal sum of six hundred and twenty thousand dollars ($620,000), with interest at the rate of seven (7) per cent. per annum; a list of which contracts has been made in duplicate, one copy whereof has been retained by the Manitoba Company and the other delivered to the Northern Company; and

81 *Other Property Owned by Manitoba Co.*

Whereas, The Manitoba Company is also the owner of those other items of property mentioned below, to-wit:

The brick building, situated at the corner of Fourth and Wakouta streets, in the city of St. Paul, State of Minnesota, formerly used by the Manitoba Company for its general offices, and the ground whereon said building stands;

Certain timbered lands situated in the County of Todd, State of Minnesota, acquired for a supply of wood materials for the repair and maintenance of the Manitoba Company's railways, the greater part of which lands are subject to the contracts of sale mentioned next below; the timber valuable for railway uses, having prior to the making of such contracts, been removed therefrom; also

Certain contracts heretofore entered into with divers persons for the sale to them of certain tracts of the said timbered lands;

All which said building and ground, timbered lands, and contracts of sale, together with the moneys accrued, and to accrue, on said contracts, are subject to the lien of the said Consolidated Mortgage; and

Whereas, The Manitoba Company is owner of those other items of property mentioned below, to-wit:

82 *Ramsey and Hennepin Co. Land.*

A certain beneficial interest in those certain parcels of land, situated in the Counties of Ramsey and Hennepin, State of Minnesota, particularly described in a written agreement, bearing date April 1, A. D. 1886, between the Manitoba Company as party of the first part, the Saint Anthony Elevator Company as party of the second part, and Adolphus H. Bode as party of the third part, the legal title to the said parcels of land now being held in the name of the Minneapolis Trust Company, as trustee; and the extent and nature of the said beneficial interest, and the obligations of the Manitoba Company in connection with said lands, and the business of the said Elevator Company prosecuted thereon, being fully set forth in the said agreement, and in another written agreement between the same parties

bearing date the same day, and in another written agreement between the same parties bearing date July 1, A. D. 1889; also

Hotel Lafayette.

The hotel building situated on the north shore of Lake Minnetonka, in Hennepin County, State of Minnesota, and known as "Hotel Lafayette," with the grounds appertaining thereto.

Other Property Owned by Manitoba Co.

Also, the lots and lands situated near said hotel, designated in the Manitoba Company's accounts and records as its "Minnetonka Beach Lands"; also

83 Certain pine timbered lands, situated in the County of Millelacs, State of Minnesota; also

Sundry lots and unplatted lands included within sundry townsites, and not forming parts of any lands granted to said company or to its predecessors in interest, by the State of Minnesota, as hereinbefore mentioned; of which lots and unplatted lands the Manitoba Company has made a schedule, in duplicate, one copy whereof it has delivered to the Northern Company, and the other whereof it has retained; and

M. & St. C. Land Grant.

Whereas, the Manitoba Company has also acquired and now owns the beneficial right and title to certain lands, heretofore granted by the State of Minnesota to the Minneapolis and Saint Cloud Railroad Company, to aid in the construction of that part of the railway lines which the last named company was authorized to build, extending from Saint Cloud to Hinckley, in the State of Minnesota; and

Contracts.

Whereas, By a written contract, bearing date October 1, A. D. 1882, between the Manitoba Company and the

N. P., F. & B. H.

Northern Pacific, Fergus and Black Hills Railroad Company, a corporation organized and existing under the laws of the State of Minnesota, the Manitoba Company acquired, subject to the

84 rentals, terms and conditions in the said contract set forth, the perpetual right to the use of all that part of the railroad of the said Northern Pacific, Fergus and Black Hills Railroad Company, extending from Fergus Falls to Breckenridge; and

L. F. & D.

Whereas, By another written contract, bearing date October 1, A. D. 1882, between the Manitoba Company and the Little Falls and

Dakota Railroad Company, another corporation organized and existing under the laws of the State of Minnesota, it was, in substance, provided, that, upon the terms and conditions therein set forth, the line of railroad of the Little Falls and Dakota Railroad Company, extending from Sauk Centre to Morris, and the line of railroad of the Manitoba Company extending from Morris to Brown's Valley should, at the pleasure of either of the said parties, be deemed united, so as to form a continuous line of railroad extending from Sauk Centre to Brown's Valley, subject to use by both said parties in common; and

M. & St. L.

Whereas, By a contract, bearing date August 27, A. D. 1874, between the First Division of the St. Paul and Pacific Railroad Company, the predecessor in interest of the Manitoba Company, and the trustees under certain mortgages theretofore made by the said First Division Company, as parties of the first part, and the Minneapolis and Saint Louis Railway Company, another railway corporation, as party of the second part, the said Minneapolis and Saint Louis Railway Company was leased the right to construct certain railroad tracks upon and over the right of way and station grounds of the said First Division Company, in the city of Minneapolis, State of Minnesota, and also the right to a joint use of a certain portion of another track running over said grounds and belonging to the said First Division Company; the last named company reserving to itself the right to a joint use of one of the said tracks so to be built by the said Minneapolis and Saint Louis Railway Company; all upon certain considerations, terms and conditions in said contract set forth; and the Manitoba Company having succeeded to all the rights and obligations originally accruing to and against the said First Division Company under said contract; and

85

St. P., S. & T. F.

Whereas, By a written contract, bearing date September 25, A. D. 1879, between the Manitoba Company and the Saint Paul, Stillwater and Taylor's Falls Railway Company, another railway corporation, certain trackage rights in and to certain tracks of the Manitoba Company in the said city of Saint Paul, were leased to the said Saint Paul, Stillwater and Taylor's Falls Railway Company, upon terms and conditions and for rentals in the said contract set forth; the Chicago, Saint Paul, Minneapolis and Omaha Railway Company having succeeded to the rights and obligations of the said Saint Paul, Stillwater and Taylor's Falls Railway Company under such contract; and

86

C., St. P., M. & O.

Whereas, By certain written contracts, one bearing date August 7, A. D. 1880, and another dated March 31, A. D. 1883, between the Manitoba Company and the said Chicago, Saint Paul, Minneapolis

and Omaha Railway Company, certain other trackage rights in and to certain tracks of the Manitoba Company, extending from Saint Paul to Minneapolis, were leased to the said Chicago, Saint Paul, Minneapolis and Omaha Railway Company, for certain periods, and upon terms and conditions, and for rentals, in said contracts set forth; and

N. P.

Whereas, By a certain other contract, bearing date October 1, A. D. 1882, between the Manitoba Company and the Northern Pacific Railroad Company, another railroad corporation, certain trackage rights, in and to certain tracks also extending from Saint Paul to Minneapolis, were leased to the said Northern Pacific Railroad Company, for a period, and upon terms and conditions, and for rentals, in said contract set forth; and

M., St. C. & W.

Whereas, By certain other contracts, one bearing date October 1, A. D. 1884, and another bearing date July 17, A. D. 1886, between the Manitoba Company and the Minnesota, Saint Croix and
87 Wisconsin Railroad Company, another railroad corporation, certain trackage rights on certain tracks of the Manitoba Company, extending from Saint Paul to Minneapolis, and certain privileges in the passenger station of the Saint Paul Union Depot Company, in Saint Paul, and certain privileges in the passenger station of the Minneapolis Union Railway Company, in Minneapolis, and certain yard, switching, roundhouse, and freight house services, in the yards and freight houses of the Manitoba Company, in Minneapolis, and certain locomotive service between Saint Paul and Minneapolis for certain passenger trains of the said Minnesota, Saint Croix and Wisconsin Railroad Company, were granted to the last named company, for certain periods, and upon terms and conditions, and for rentals and other payments, in said contracts set forth; and

W. C.

Whereas, By another written contract, bearing date July 2, A. D. 1888, between the Manitoba Company and the Wisconsin Central Company, another railway corporation, as the successor in interest of the said Minnesota, Saint Croix and Wisconsin Railroad Company, the said two contracts between the Manitoba Company and the said Minnesota, Saint Croix and Wisconsin Railroad Company were modified in certain minor particulars, and all the obligations of the same, as so modified, were assumed by the said Wisconsin Central Company; and

88 *C., B. & N.*

Whereas, By three other written contracts, bearing date, respectively, May 11, A. D. 1886, between the Manitoba Company and the

Chicago, Burlington and Northern Railroad Company, another railroad corporation, certain trackage rights on certain tracks of the Manitoba Company extending from Saint Paul to Minneapolis, and a certain freight house of the Manitoba Company in Saint Paul, and certain yard privileges and switching services in St. Paul, and certain yard, switching, roundhouse and freight house services in the roundhouse yards, and freight houses of the Manitoba Company, in Minneapolis, were granted to the said Chicago, Burlington and Northern Railroad Company, for certain periods, and upon terms and conditions, and for rentals and other payments, in said contracts set forth; and

M. & N. W.

Whereas, By another written contract, bearing date August 1, A. D. 1887, between the Manitoba Company and the Minnesota and Northwestern Railroad Company, another railway corporation, certain trackage rights in certain tracks of the Manitoba Company extending from Saint Paul to Minneapolis, were leased to the said Minnesota and Northwestern Railroad Company, for a period, and upon terms and conditions, and for rentals and other payments, in said contract set forth; and

89 *M., St. P. & S. Ste. M.*

Whereas, By another contract, bearing date June 1, A. D. 1889, between the Manitoba Company and the Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, another railway corporation, certain trackage rights in certain tracks of the Manitoba Company, extending from Saint Paul to Minneapolis, and also certain rights in the passenger station of the Saint Paul Union Depot Company in Saint Paul, were leased to the said Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, for a period, and upon terms and conditions, and for rentals and other payments, in said contract set forth; and

St. P. U. D. Co.—Deed and Contract.

Whereas, By a deed, bearing date January 13, A. D. 1880, made by the Manitoba Company to the Saint Paul Union Depot Company, and also by a written contract, bearing date February 10, A. D. 1880, between the same parties, the Manitoba Company has reserved, and has been assured, certain rights for the use of its own traffic and for the use of the traffic of such other companies as it has admitted, or shall admit, to participate in the enjoyment of such rights, in the tracks, platforms, passenger depot, and other facilities and plant of the said Saint Paul Union Depot Company, in Saint Paul, upon terms and conditions, and for payments, in said contract set forth; and

90 *Minn. Union.*

Whereas, By a written contract between the Manitoba Company and the Minneapolis Union Railway Company, bearing date July

1, A. D. 1886, the Manitoba Company has secured for the use of its passenger trains and business, certain rights and privileges in the tracks, platforms, passenger depots and other facilities and plant of the said Minneapolis Union Railway Company, for a period, and upon the terms and conditions, and for rental and other payments, in said contract set forth; and

Sundry Licenses, Permits, etc.

Whereas, The Manitoba Company has granted to sundry persons and corporations, licenses and permits, for limited periods, to place and maintain, upon its right of way, and other grounds, grain elevators and warehouses, lumber yards, fuel yards, oil sheds, and other industries, and has likewise made contracts with divers persons and corporations relating to the performance of switching and other traffic and operating services for such persons and corporations, including a contract with the

American Exp.

American Express Company, for the handling of express traffic upon its railway system, and has made contracts with divers other carriers for the exchange of traffic; of which licenses, permits, and contracts, a duplicate list has been prepared, one copy whereof
91 has been delivered to the Northern Company, and the other retained by the Manitoba Company; and

W. U. Tel. Co.

Whereas, by a written contract, bearing date July 1, A. D. 1882, between the Manitoba Company and the Western Union Telegraph Company, telegraph lines have been constructed, and are being maintained and operated along said railways, upon terms and conditions in said contract set forth; and

Bonded Debt Manitoba Co.

Whereas, The Saint Paul and Pacific Railroad Company, being then the owner of the railroad extending from Saint Paul via Saint Anthony (now Eastern Division of the city of Minneapolis) to Watab, now owned by the Manitoba Company, by trust deed, bearing date June 2, A. D. 1862, executed to Russell Sage and Samuel J. Tilden, as

St. Paul & P. Mortgage.

trustees, mortgaged the said railroad and its appurtenances, to secure the payment of certain bonds maturing July 1, A. D. 1892; of which bonds there now remain outstanding and unpaid, bonds to the amount of three hundred and sixty-six thousand dollars ($366,000) principal, bearing interest at the rate of seven (7) per cent. per

annum, payable semi-annually on the first days of January and July of each year; and

Manitoba Co.'s Bonds.

Whereas, The Manitoba Company has, since its organization, issued and negotiated bonds secured by trust deeds of its railways and other property, as follows, to-wit:

First Mortgage 7's.

Bonds amounting to eight millions of dollars ($8,000,000) principal, bearing interest at the rate of seven (7) per cent. per annum, payable semi-annually on the first days of January and July of each year, bearing date June 21, A. D. 1879, maturing July 1, A. D. 1909, and secured by deed of trust upon certain railways forming portions of the railways leased by this instrument, and granted lands therein described, bearing even date with said bonds, and executed to John S. Kennedy, John S. Barnes and James A. Roosevelt, as trustees, commonly known as the Manitoba Company's First Mortgage; of which bonds there remain outstanding at the date hereof bonds whose principal sums amount in the aggregate to the sum of four million four hundred and eighty thousand dollars ($4,480,000); all said bonds being subject to redemption, with the net proceeds of the sales of said granted lands, as in said bonds and in the said mortgage particularly set forth:

Second Mortgage 6's.

Bonds amounting to eight millions of dollars ($8,000,000) principal, bearing interest at the rate of six (6) per cent. per annum, payable semi-annually on the first days of April and October of each year, bearing date October 1, A. D. 1879, maturing October 1, A. D. 1909, and secured by deed of trust upon certain railways therein described, forming portions of the railways leased by this instrument, bearing even date with said bonds, and executed to John S. Kennedy and Samuel Thorne, as trustees, commonly known as the Manitoba Company's Second Mortgage; all of which bonds remain outstanding:

Dakota Extensions Mortgage 6's.

Bonds amounting to five million six hundred and seventy-six thousand dollars ($5,676,000) principal, bearing interest at the rate of six (6) per cent. per annum, payable semi-annually on the first days of May and November of each year, bearing date November 1, A. D. 1880, maturing November 1, A. D. 1910, and secured by deed of trust upon certain railways therein described, forming portions of the railways leased by this instrument, bearing even date with said bonds, and executed to the Central Trust Company of New York,

as trustee, commonly known as the Manitoba Company's Dakota Extensions Mortgage; all of which bonds remain outstanding;

Consolidated Mortgage 6's and 4½'s.

Bonds to the amount of thirteen million three hundred and forty-four thousand dollars ($13,344,000) principal, bearing interest at the rate of six (6) per cent. per annum, payable semi-annually
94 on the first days of January and July of each year; also, bonds to the further amount of thirteen million six hundred and fifty-one thousand dollars ($13,651,000) principal, bearing interest at the rate of four and one-half (4½) per cent. per annum, payable semi-annually on the days last above stated; all said bonds bearing date May 1, A. D. 1883, maturing July 1, A. D. 1933, and secured by deed of trust upon certain railways forming portions of the railways leased by its instrument, and granted lands therein described, and also upon the said shares of stock of the Minneapolis Union Railway Company, the Minnesota Transfer Railway Company, and the Saint Paul Union Depot Company, owned by the Manitoba Company, bearing even date with said bonds, and executed to the Central Trust Company of New York, as trustee, commonly known as the Manitoba Company's Consolidated Mortgage; all of which bonds of both classes remain outstanding;

Montana Extensions Mortgage 4's.

Bonds amounting to seven million four hundred and sixty-eight thousand dollars ($7,468,000) principal, bearing interest at the rate of four (4) per cent. per annum, payable semi-annually on the first days of June and December of each year, bearing date June 1, A. D. 1887, maturing June 1, A. D. 1937, and secured by deed of trust upon certain railways therein described, forming portions of the railways leased by this instrument, and also upon the said
95 shares in the Montana Central Railway Company's stock owned by the Manitoba Company, bearing even date with said bonds, and executed to the Central Trust Company of New York, as trustee, commonly known as the Manitoba Company's Montana Extensions Mortgage; all of which bonds remain outstanding; and

Consolidated Mortgage Reserved Bonds.

Whereas, It is provided, in substance, in and by the said Consolidated Mortgage that, of the bonds thereby authorized to be issued, bonds to the amount of nineteen million four hundred and twenty-six thousand dollars ($19,426,000) should be irrevocably pledged and dedicated to the purpose of retiring and replacing the said bonds issued under the said First Mortgage, the said Second Mortgage, and the said Dakota Extensions Mortgage, and should be certified or issued only for that purpose, in manner and on conditions in said Consolidated Mortgage set forth; no part of which re-

rved bonds has ever been certified or issued; and all of which re-
ain subject to certification and issuance for said purpose, as occa-
on may arise; and

Sundry Assets, etc.

Whereas, In the course of its business, the Manitoba Company
as incurred sundry current liabilities, and accumulated sundry
ems of cash and other current assets, not hereinbefore referred to:
hich liabilities, cash and assets, appear upon its books of account,
and are stated in summary upon its General Ledger Balance
6 Sheet of February 1, A. D. 1890; to which Balance Sheet
and books of account reference is hereby made as to the de-
ils thereof; and

Resolutions Stockholders Sept. 30, '89.

Whereas, At an adjourned annual meeting of the shareholders
f the Manitoba Company, held in the city of New York on Sep-
ember 30, A. D. 1889, the following resolutions were adopted:

Lease Authorized—Term Of.

"Resolved, That the directors of this company, or the executive
committee thereof, be and they are hereby authorized and em-
powered to make a lease to the Great Northern Railway Company,
for a term of ninety-nine years or longer, of the entire railway and
appurtenances, rolling stock and equipment, owned, leased or con-
trolled by this corporation, and also to sell, transfer and convey to

Transfer of Securities Authorized.

the Great Northern Railway Company so much as the directors or
executive committee may deem expedient of the remaining real and
personal property of this company, excluding its land grants, but
including all stocks and bonds; subject, however, to the lien of the
Collateral Trust Mortgage for $8,000,000, upon and in consideration
of the following terms and conditions:

Issue Great Northern Pref'd Stock.

"1. That the Great Northern Railway Company shall issue
97 preferred capital stock to the amount of $20,000,000, not to
be increased without the consent of the holders of three-
fourths of all such preferred stock outstanding, and to be entitled to
dividends in preference to all other stock of such corporation at any
time to be created or issued, at the rate of not less than six per cent.
per annum, non-cumulative, free of all taxes which such corporation
may be required by any law to withhold therefrom or to pay on
account thereof.

Subscriptions to Great Northern Preferred Stock.

"II. That the holders of stock in the St. Paul, Minneapolis & Manitoba Railway Company shall have for a period, to be determined by the directors or executive committee, the privilege of subscribing, pro rata, to the whole of the preferred stock of the Great Northern Railway Company; they paying

Price.

to that company $50 per share, in cash, or in Collateral Trust Mortgage Bonds of this company; the remaining $50 being paid by the transfer of assets, as hereinbefore mentioned, subject to the liens thereon; that they shall have the right to assign such privilege under such regulations as the directors or executive committee may prescribe; and that all such preferred stock, not thus subscribed for by stockholders of this company shall be issued to this company itself, or its assigns, in consideration of the said transfer of assets and upon payment, in like manner, of the further amount of $50 per
98 share; and such shares, if issued to this company, shall be disposed of by the directors or executive committee as they may deem expedient.

Guaranty of Bonds by Great Northern.

"III. That the Great Northern Railway Company shall guarantee payment of the principal and interest of all indebtedness of this company and of all bonds upon which this company is liable either as principal or as guarantor; and that the Great Northern Railway Company shall indemnify this company against the payment thereof, on condition that this company shall consent, at the request of the Great Northern Railway Company, to any extension of the time for the payment of principal of such indebtedness and bonds or the renewal thereof by the issue of new bonds, secured by mortgage, imposing no greater liability upon this company, upon reasonable terms and for any reasonable time, not exceeding the term of the said lease.

Rental.

"IV. That the Great Northern Railway Company shall punctually pay a rent sufficient to provide for at least the following purposes, together with such others as the directors or executive committee of this company may deem necessary.

Payment of Interest.

"1. The payment, as the same falls due, of all interest for
99 which this company, or its property is or may become liable upon bonds now outstanding, together with interest or dividends upon any bonds or preferred or debenture stock which this com-

any may from time to time, with the consent of the Great North-
n Railway Company, issue in exchange for bonds issued or guar-
nteed by this company; and also the payment of such further in-
rest as this company may hereafter become liable for, either as
rincipal or guarantor, with the consent of the Great Northern
ailway Company.

Payment of 6 Per Cent. Dividend.

"2. The payment, quarterly, on the first days of February, May,
ugust and November, respectively, in each year during the term of
ne said lease, of dividends upon all the capital stock of this com-
any now outstanding, namely, $20,000,000, par value, at the rate
f six per cent. per annum, free of all taxes which either corporation
ay be required by any law to withhold therefrom or to pay on
ccount thereof.

Payment of Taxes.

"3. The payment of all taxes and assessments upon the property,
ross earnings or income of this company, and of such of its current
xpenses as its board of directors or executive committee may pre-
cribe by the terms of the lease.

Deposit of Stocks in Trust.

"4. The deposit, with a trustee or trustees, of all shares of stock
in railway or steamboat companies to be transferred under
00 this arrangement to the Great Northern Railway Company,
with a provision that the same shall not be sold, mortgaged,
oledged or otherwise alienated, in whole or in part, without the
ssent of this company.

Other Conditions.

"5. That the Great Northern Railway Company shall comply
with such other terms and conditions as, in the judgment of the di-
rectors or executive committee of this company, may be necessary or
expedient and be expressed in the said lease; and in such lease the
directors or executive committee of this company, may, if desired by
the Great Northern Railway Company bind the St. Paul, Minne-
apolis & Manitoba Railway Company not to exercise its borrowing
or guaranteeing powers, in future, except upon the request or with
the consent of the Great Northern Railway Company."

Approval by Northern Co.

And whereas, At a meeting of the stockholders, and also at a
meeting of the board of directors, of the Northern Company, held
on November 11, A. D. 1889, the proposals embodied in the said
resolutions of the shareholders of the Manitoba Company were ac-
cepted, and were directed to be carried out; and

Great Northern Stock Subscribed and Paid for.

Whereas, In pursuance of the terms of the said resolutions, and of the acceptance thereof by the shareholders and board of
101 directors of the Northern Company, the preferred stock of the Northern Company has been subscribed for by the shareholders of the Manitoba Company, or their assigns, to the extent of two hundred thousand (200,000) shares; and the sum of fifty dollars ($50) in cash, or its equivalent, for each share subscribed, has been paid into the treasury of the Northern Company; and the Northern Company has paid off and redeemed the bonds of the Manitoba Company,

Manitoba Co.'s Collateral Trust Bonds Retired.

amounting to eight millions of dollars ($8,000,000) principal, commonly known as its Collateral Trust Bonds, whereby the stocks and bonds pledged and mortgaged to the Central Trust Company of New York, as trustee, by mortgage dated August 1, A. D. 1888, as security for the payment of said bonds, have been released from the lien thereof; and

Legislative Authority.

Whereas, The several acts of legislature relating to the Manitoba Company, and to the Northern Company, respectively, authorize the doing of the acts hereby intended to be done, and the making of the engagements hereby intended to be made,

Now therefore, This Indenture witnesseth.

ARTICLE I.

Property Leased.

SECTION 1. The Manitoba Company hereby leases to the Northern Company all the several railways and lines of railway owned
102 by it, the Manitoba Company, the same being situated as hereinbefore recited, together with all the rights and franchises appertaining thereto, and all right of way, yard grounds and yards, station grounds and stations, grounds acquired and held for use in connection with its said railways, or any of them, whether acquired and held in its own name, or in the name of some other person or corporation for its use; side tracks, spur tracks, machine shops and repair shops, and the machinery, tools and implements therein or used in connection therewith; round-houses, turn tables, water supply plant and equipment; warehouses, depots, and the furniture and fixtures thereof; fuel sheds, and all tools, implements, and tackle designed for use in connection therewith; stationary and portable engines, locomotive engines, passenger cars, baggage cars, mail cars, express cars, business cars, and cars of all other descriptions designed for use in passenger trains; box cars

stock cars, flat cars, coal cars, and cars of all other descriptions designed for use in freight trains; snow plows, steam shovels, wrecking cars, boarding cars, dump cars, Peteler cars, hand cars, push cars, and work cars of all other descriptions; track tools, and engineering tools and instruments, owned by the Manitoba Company; also the general office building, located on the northerly side of Third street, in Saint Paul, now occupied by the Manitoba Company, with its furniture and fixtures; also, all other property, tools, implements, machinery, equipment, fixtures and appurtenances
103 owned by the Manitoba Company, and acquired for use in connection with its railways, or any of the same, save as hereinafter excepted;

Term—Date.

To have and to hold all and singular the premises, unto the Northern Company, its successors and assigns, for and during the full term of nine hundred and ninety-nine (999) years, from and after twelve o'clock midnight of January 31, A. D. 1890, subject to the rentals, terms, conditions, exceptions and limitations hereinafter set forth.

Property Reserved from Lease.

SECTION 2. The said building located at the corner of Fourth and Wakouta Streets, in St. Paul, formerly used by the Manitoba Company as its general office building, together with the ground whereon the same stands, and the said timbered lands in Todd County, Minnesota, being subject to the lien of one or more of the said mortgages, are hereby reserved from the operation of the said lease; and all net revenues hereafter derived from the same, and all net proceeds of sales of the same, or any part thereof, hereafter realized, shall be paid over to the trustee or trustees in the said mortgage or mortgages entitled to the same, as part of the sinking fund provided for in such mortgage or mortgages.

Marking, etc., Leased Property.

SECTION 3. All locomotives, engines and cars of all descriptions, hereby leased, shall be numbered in accordance with the
104 numbers of engines and cars of the several classes now used by the Manitoba Company. All other machinery, tools, implements, furniture and instruments coming under the operation of this lease, so far as may, from time to time, be required by the board of directors or executive committee of the Manitoba Company, shall have placed and maintained thereon such distinctive marks as the board of directors or executive committee of the Manitoba Company may reasonably require; to indicate the ownership thereof by the Manitoba Company; and all locomotive engines, cars machinery, tools, implements, furniture or instruments furnished by the Northern Company in replacement of similar articles so leased as

hereinafter provided, shall also be numbered or marked in the same manner.

Maintenance Leased Property—Title to Renewals, etc.

SECTION 4. The Northern Company shall, during the term of the said lease, operate the railways hereby leased in a prudent, faithful and diligent manner, due regard being given to the development of the traffic and other business thereof, and shall keep up and maintain the said railways and other leased property, so that the said railways and all other items of leased property shall, at all times, be in at least as high condition and state of efficiency as the same are at the date hereof; whenever and as often as may be necessary, renewing and replacing the same, and the several parts thereof, with others at least as valuable and efficient for the uses for
105 which the same were procured or kept, as those replaced thereby; so that the said railways, and all their appurtenances and all and singular their tracks, terminals, stations, motive power, rolling stock, machine shops, water service, and all other appurtenances and equipment, shall at all times during the term of this lease be kept and maintained in a high condition and state of efficiency, and at least equal in condition and state of efficiency to that of the same existing at the present time. Every item of property procured or furnished by the Northern Company in replacement of a similar item hereby leased, as above provided, shall at once, and without further act, become the property of the Manitoba Company, and subject to all liens to which such replaced article was subject at the time of such replacement, if so provided in the instruments creating such liens.

Sales of Leased Property (Portable)—Assent of Manitoba Co. Required—Assent Mortgage Trustees Required—Proceeds May be Reinvested—Title to Reinvestments.

SECTION 5. Should any item of portable property hereby leased become obsolete, or unnecessary or undesirable for use in connection with the maintenance or operation of the said leased railways, or some of them, the Northern Company may, with the assent of the board of directors or executive committee of the Manitoba Company, and with the authorized assent of the trustee or trustees in any mortgage or mortgages forming a lien upon the same, sell the
106 same at a fair and reasonable price; and, in event of such sale, the moneys arising therefrom, or other proceeds thereof, shall belong and be paid to the Manitoba Company; and shall, at the request of the Northern Company, if made within a reasonable time, be reinvested in other articles of property necessary or desirable for use in connection with the said leased railways; which last named articles shall, upon purchase, be transferred and conveyed to the Manitoba Company, free and clear of liens and incumbrances, save such as may be created by the Manitoba Company itself; and, upon acquisition by the Manitoba Company, shall become subject

to this lease, and also to all liens to which the said property was subject at time of sale, if so provided in the instruments creating such liens.

Disposition Proceeds Not Reinvested.

In event of the failure of the Northern Company to request, within a reasonable time, the reinvestment of the said moneys or other proceeds of sale, in articles necessary or desirable for use in connection with the said leased railways, such moneys or other proceeds, or the portion thereof, remaining in hand, if only a part thereof shall have been so reinvested, shall, so far as the same shall suffice, be faithfully applied by the Manitoba Company as follows:

107 *Disposition Proceeds Portable Property Sold.*

Firstly. To retirement for cancellation of its outstanding bonds, secured by mortgages forming liens upon the property so sold at the time of sale, and upon such proceeds after sale, in order of priority, by paying the same into the sinking or redemption funds provided by such mortgages; or, in absence of provisions for such sinking or redemption funds, by purchase of such bonds in the open market, or by tender;

Secondly. To retirement for cancellation of any other outstanding interest bearing bonds, or forms of obligation for indebtedness of the Manitoba Company, secured by lien upon its properties, in order of priority, in manner by such bonds, or other obligations, or in any instrument creating the lien securing the same, provided; or, in absence of such provisions, by purchase in the open market, or by tender;

Thirdly. To retirement for cancellation of outstanding shares in the capital stock of the Manitoba Company, by purchase in the open market, or by tender.

All such purchases of bonds or stock for retirement and cancellation shall be made under such rules and regulations, and in such markets, as shall seem most likely to insure the lowest prices and most favorable terms for the stock and bonds to be purchased.

108 *Sales of Leased Property (Real)—Assent Manitoba Co. Required—Assent Mtg. Trustees Required.*

SECTION 6. With the assent of a majority of all the directors in the Manitoba Company's board of directors, to be given at a regular or specially called meeting of such board, and with the authorized assent of the trustee or trustees in, or beneficiaries under, any mortgage or mortgages, or other instrument, at the time forming a lien or liens upon the same, in case such sale shall not be made subject to such lien or liens, the Northern Company may, at a fair and reasonable price, sell the whole or any part of either of the said leased railways, or of any other parcel of the said leased property, which, in the opinion of the Northern Company, and of the said assenting

majority of the Manitoba Company's directors, shall have become unnecessary, or undesirable, or inconvenient for use in connection with the said leased system of railways; and the Manitoba Company shall make, or join in making, the necessary conveyances thereof, and in case of such sale, the moneys arising therefrom, or the proceeds thereof in other form than money, shall belong to the Manitoba Company and shall be paid thereto, in absence of liens upon the same, by mortgage or otherwise, requiring their payment to other parties; and such moneys or other proceeds may, unless differently provided in some mortgage, or other instrument forming a lien thereon, with the concurrence of the Northern Company, and the majority of directors of the Manitoba Company aforesaid, to be expressed in manner aforesaid, be

Proceeds May be Reinvested.

reinvested, either by way of construction or purchase, or both, in other railways, railway plant, lands or structures, reasonably desirable, and reasonably adapted and convenient for use in connection with the system of railways hereby leased; which other railways, railway plant, lands or structures shall, when and as acquired or constructed, become vested in, and be conveyed to, the Manitoba Company by suitable instruments of conveyance or

Title to Reinvestments.

otherwise, as the exigencies of particular cases may require; and shall become subject to this lease, and also to the lien of any mortgage or mortgages, or other instrument, which had formed a lien or liens upon the railway or other property so sold, at the time of sale, if so provided in such mortgage or mortgages, or other instrument.

Disposition Proceeds not Reinvested—Governmental Expropriations.

In event of failure to reinvest the proceeds of any such sale, or any part thereof, as above provided, within a reasonable period, such proceeds shall be used by the Manitoba Company, so far as the same shall suffice, in the same manner as provided in the next preceding section of this Article, with reference to the proceeds of sales of leased portable property which shall not have been reinvested as in said section provided. Moneys arising from expropriations, under governmental authority, of any of the properties hereby leased, whether real or personal, shall be disposed of in the same manner as if the same property had been sold, as hereinbefore provided, by the parties.

Supply of Additional Property (Real and Portable).

SECTION 7. The Northern Company shall also, at its own cost, furnish and supply all tracks, structures and plant, upon the leased property, and also all equipment, machinery and tools, in addition

to the tracks, structures, plant, equipment, machinery and tools hereby leased, and the renewals and replacements thereof hereinbefore provided for, that may at any time during the term of the said lease be needed for the prompt and efficient handling of the traffic, and transaction of the business, of the system of railways hereby leased, due regard being given to the volume of such traffic and business, and to the proper and prudent development thereof, or that may be required by law.

Title to Additions When Vested.

All such additional tracks, structures and plant of a permanent nature, placed upon the leased property in pursuance of this section, shall become and form parcel of the property owned by the Manitoba Company; subject, however, to the lease-hold interest therein of the Northern Company created by this instrument; but
111 the materials in all tracks, structures and plant, merely temporary in character, placed upon the leased property by the Northern Company, and all additional equipment, machinery and tools of a portable nature, provided by the Northern Company in pursuance of this section, shall remain the property of the Northern Company.

Nothing herein contained shall prevent the payment for such additional tracks, structures, plant, equipment, machinery, or tools, out of the proceeds of any bonds, or other evidences of debt, which may hereafter be issued by the Manitoba Company at the request, and under the guaranty, of the Northern Company, if such use of such proceeds shall be consistent with the terms of such bonds and of the mortgage or other instrument securing payment thereof; but in event of the payment for any such additional tracks, structures, plant, equipment, machinery, or tools, out of any such proceeds, the ownership of the same shall vest in the Manitoba Company, and the same shall become and be subject to the operation of the lease herein contained; and the Northern Company shall not, in any event, become entitled to reimbursement for any part of the cost thereof.

Lease Subject to—All Mortgages—All Contracts—All Licenses, Permits—Switching and Traffic Contracts—Northern Co. Assumes Liabilities and Entitled to Benefits.

Section 8. The lease aforesaid is made by the Manitoba
112 Company, and taken by the Northern Company, subject to the lien of the said mortgage made by the Saint Paul and Pacific Railroad Company, and also subject to the respective liens of the said several mortgages made by the Manitoba Company; and also subject to the rights of any and all parties other than the parties hereto, which have accrued, or may accrue, under either or all of the said contracts with the Eastern Railway Company, the Northern Pacific, Fergus and Black Hills Railroad Company, the Little

Falls and Dakota Railroad Company, the Minneapolis and Saint Louis Railway Company, the Saint Paul, Stillwater and Taylor's Falls Railway Company, the Chicago, Saint Paul, Minneapolis and Omaha Railway Company, the Northern Pacific Railroad Company, the Minnesota, Saint Croix and Wisconsin Railroad Company, the Wisconsin Central Company, the Chicago, Burlington and Northern Railroad Company, the Minnesota and Northwestern Railroad Company, the Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, the Saint Paul Union Depot Company, the Minneapolis Union Railway Company, the Western Union Telegraph Company, the St. Anthony Elevator Company and the American Express Company, and under either or all the said licenses and permits, to sundry persons and corporations, for the placing upon the right of way, or other grounds of the Manitoba Company, of grain elevators and warehouses, lumber yards, fuel yards, oil sheds and other industries, or under the said contracts with divers persons and corporations for the performance of switching and other
113 traffic and operating services, and for the exchange of traffic; and the Northern Company hereby assumes all liabilities and obligations that have arisen, or that could or might hereafter arise during the term of said lease, against the Manitoba Company, under all or any of the said mortgages, contracts, licenses and permits, and shall save the Manitoba Company harmless on account thereof; and, so long as it continues to faithfully fulfill its obligations in this instrument contained, shall be entitled to realize and enjoy all rights, revenues and other advantages, accruing or that might accrue, to the Manitoba Company, through or on account of the same, during the term of the said lease.

Article II.

Sale and Transfer—Property Sold—Materials and Fuel—Material and Fuel Contracts—Northern Co. Assumes.

Section 1. The Manitoba Company hereby sells and transfers to the Northern Company all the stocks of fuel, and of materials of all kinds, acquired or intended for use or consumption, in connection with the maintenance or operation of the railways and property hereby leased, on hand at the date of this instrument, and also all contracts for the purchase of any such fuel or materials, with any and all persons and corporations, existing and unfulfilled at the date of this instrument; of which contracts a duplicate list has been prepared, one copy whereof has been delivered to the Northern
114 Company, and the other retained by the Manitoba Company; and the Northern Company hereby assumes all obligations of the Manitoba Company, under said contracts, and shall hold the Manitoba Company harmless on account of the same.

Securities Sold.

Section 2. The Manitoba Company hereby sells, assigns and transfers unto the Northern Company all the right, title, and interest

of the Manitoba Company in and to the following mentioned securities and property, that is to say:

Bonds.

The said bonds of the Willmar and Sioux Falls Railway Company, being two thousand six hundred and twenty-five (2,625) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered from 1 to 2,625 inclusive;

The said bonds of the Duluth, Watertown and Pacific Railway Company, being one thousand three hundred and seventy-five (1,375) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered from 1 to 1,375 inclusive;

The said Montana Extension bonds of the Manitoba Company, being six (6) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered from 1,917 to 1,921 inclusive, and 3,694.

The said Consolidated Mortgage bonds of the Manitoba Company, being seven hundred and fifty (750) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered from 25,951 to 26,700 inclusive;

115 The said bonds of the Montana Central Railway Company, being five hundred (500) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered from 4,501 to 5,000 inclusive;

The said First Mortgage bond of the Manitoba Company, being one (1) bond, for the principal sum of one hundred dollars ($100), numbered 1,146;

The said bonds of the County of Todd, being three hundred and four (304) bonds, for the principal sum of one hundred dollars ($100) each, numbered from 1 to 304 inclusive;

The said bonds of the Village of Hutchinson, being twelve (12) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered from 1 to 12 inclusive;

The said bonds of the Town of Breckenridge, being three (3) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered from 1 to 3 inclusive, and one (1) bond, for the principal sum of thirteen hundred dollars ($1,300), numbered 4;

The said bonds of the County of Pipestone, being thirty (30) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered from 1 to 30 inclusive;

The said bonds of the Town of Minnesota Falls, being two (2) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered 1 and 2;

The said bonds of the Town of Sandnes, being two (2) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered 1 and 2;

116 The said bonds of the Minnesota Transfer Railway Company, being one hundred and nine (109) bonds, for the principal sum of one thousand dollars ($1,000) each, numbered from 1 to 63 inclusive, from 505 to 536 inclusive; from 761 to 766 inclusive; from 809 to 815 inclusive; and 865;

Stocks.

The said fifty-six (56) shares in the capital stock of the Manitoba Company, the same being evidenced by stock certificate numbered A 10,777;

The said fourteen hundred and ninety (1,490) shares in the capital stock of the Climax Coal Company, the same being evidenced by stock certificates numbered 1, 5, 6, 7, 8 and 9;

The said one hundred and sixty-seven (167) shares in the capital stock of the Lake Superior Terminal and Transfer Railway Company, the same being evidenced by stock certificates numbered 17, 18, 19, 22, 23, 37, 49, 57, 63, 70, 79, 85, 93, 100 and 107;

The said two thousand five hundred (2,500) shares in the capital stock of the Sand Coulee Coal Company, the same being evidenced by stock certificates numbered 1 to 6 inclusive;

The said fifteen hundred (1,500) shares in the capital stock of the Saint Paul Foundry Company, the same being evidenced by stock certificates numbered 3, 5, 6, 12 and 16;

The said one hundred and sixteen (116) shares in the capital stock of the Fort Benton Bridge Company, the same being evidenced by stock certificate numbered 47;

117 *Land Contracts.*

The said land contracts for the sale of certain of its granted lands, owned as aforesaid by the Manitoba Company, free from the lien of any of its said mortgages; of which contracts duplicate lists have been made and disposed of as aforesaid; the principal sum remaining unpaid on said contracts at the date hereof being, approximately, the sum of six hundred and twenty thousand dollars ($620,000); also

M. & St. C. Land Grant.

All the said beneficial right and title of the Manitoba Company to the said lands granted by the State of Minnesota to the Minneapolis and Saint Cloud Railroad Company.

ARTICLE III.

Minnesota Transfer Stock—Title to—Disposition of Revenues—Powers of Att'y and Proxies—Property of—Not to be Alienated.

The title to the said shares in the capital stock of the Minnesota Transfer Railway Company, and the interests and rights in the properties and facilities of the said company, vested in the Manitoba Company by reason of its ownership of the said shares, shall, for mutual convenience, be retained by the Manitoba Company until transferred to the Northern Company, as hereinafter provided; but so long as the Northern Company shall continue to faithfully per-

form its covenants and obligations contained in this instru-
118 ment, the Manitoba Company shall pay over all revenues therefrom to the Northern Company, from time to time as the same shall be received by the Manitoba Company, and shall from time to time, at the request of the Northern Company, deliver to it all orders and powers of attorney needful or desirable for use by it in obtaining the said revenues directly from the said Transfer Company, and also such proxies as may be necessary to enable the Northern Company to freely exercise the voting powers arising out of, or connected with the said shares, according to its own discretion, so far as relates to the conduct of the ordinary business of the said company, and so far as permitted by the by-laws of the Minnesota Transfer Railway Company. The Northern Company shall not, however, without the express and specific consent of a majority of all the directors in the Manitoba Company's board of directors, given at a regular or a specially called meeting of such board, concur in, or suffer to be done, by means of any such proxy, or the representative of the Northern Company in the directorate of the Minnesota Transfer Railway Company, any act by such company whereby any portion of the real property of such company, essential for the transaction of the business which it has been organized to transact, shall be alienated, in whole or in part.

119 *Traffic Rights.*

The Northern Company shall, so long as it shall continue to faithfully perform it covenants and obligations contained in this instrument, have and enjoy, for the handling of the traffic of the said leased railways, all the rights and facilities, upon the grounds of the Minnesota Transfer Railway Company, which the Manitoba Company would be entitled to have and enjoy in respect to the same or similar traffic, by reason of its ownership of the stock and bonds of the said Transfer Company; the Northern Company making all payments, on account of the use and enjoyment of such facilities, which the Manitoba Company would be required to make by the by-laws, rules, and regulations of the said Transfer Company, in time and manner as required by such by-laws, rules and regulations, and satisfying all and singular the other requirements of such by-laws, rules and regulations which would be incumbent upon the Manitoba Company itself if handling the same or similar traffic.

Custody of Stock Certificates—Alienation of Stock.

The certificates for the said shares shall forthwith be placed in the possession and custody of the Trustee, to be by it held and retained for the use and benefit of the other parties hereto, respectively, in accordance with the provisions of this instrument; and the same shall not be subject to pledge, mortgage, sale or other aliena-
120 tion, during the term of this lease, by either of said parties, save as next below provided, that is to say:

Disposition Proceeds (*Art.* 1, *Sec.* 6).

The said shares of stock may, subject to the by-laws and regulations of the Minnesota Transfer Railway Company, be pledged or mortgaged with like assent of the Manitoba Company, or may be sold, under like circumstances, limitations and conditions, and, in event of any such sale, the proceeds thereof shall be disposed of in like manner, as provided in Article I of this instrument respecting the sale, and the disposition of the proceeds of the sale, of the said leased railways and other real property.

Title to go to Trustee—When.

The title to the said shares, unless prevented by the by-laws of the Minnesota Transfer Railway Company, shall, at the request of the Northern Company, be assigned to the Trustee, subject to the lien of the said Consolidated Mortgage, to be by the Trustee held in trust for the benefit of the parties hereto, in the same manner as provided with reference to the shares in the stock of certain other companies, the title whereof is assigned to the Trustee by the next succeeding Article of this instrument.

M. T. Stock.

So long as the said stock shall stand in the name of the Manitoba Company, all certificates evidencing the same shall, at the request of the Northern Company, have indorsed thereon the statement
121 that the same is held subject to the trusts created by, and to the provisions of, this instrument.

ARTICLE IV.

Stocks Transferred to Trustee.

SECTION 1. The Manitoba Company hereby assigns and transfers to the Trustee all the following mentioned stocks, that is to say:

The said fifty thousand (50,000) shares in the capital stock of the Eastern Railway Company of Minnesota, the same being evidenced by stock certificates numbered 1, 2, 3, 12, 13, and 15;

The said fifty thousand (50,000) shares in the capital stock of the Montana Central Railway Company, subject to the lien of the said Montana Extensions Mortgage, the same being evidenced by stock certificates numbered 2, 3, 4, 5, 7 and 9;

The said fifteen thousand (15,000) shares in the capital stock of the Willmar and Sioux Falls Railway Company, the same being evidenced by stock certificates numbered 1 to 9 inclusive;

The said seven thousand three hundred (7,300) shares in the capital stock of the Duluth, Watertown and Pacific Railway Company, the same being evidenced by stock certificates numbered 1 to 9 inclusive;

The said fifteen thousand (15,000) shares in the capital stock of the Northern Steamship Company, the same being evidenced by stock certificates numbered 1, 3, 5, 6 and 7;

The said five thousand (5,000) shares in the capital stock of the Minneapolis Union Railway Company, subject to the lien
122 of the said Consolidated Mortgage, the same being evidenced by certificates numbered 1, 3, 9, 10, 11, 12 and 14;

And the said seven hundred (700) shares in the capital stock of the Saint Paul Union Depot Company, subject to the lien of the said Consolidated Mortgage, the same being evidenced by certificates numbered 1, 21, 45, 50 and 105.

To have and to hold the title to all and singular the said shares, in trust for the use and benefit of the parties hereto, in accordance with the provisions of this instrument.

Indorsement of Stock Certificates in the Trust.

SECTION 2. All certificates, at any time during the term of the said lease, evidencing ownership of the said shares of stock, shall, at the request of the Manitoba Company, have indorsed thereon the statement that the same are held subject to the trusts created by, and to the provisions of, this instrument.

Qualification of Directors.

The Trustee shall, however, at the request of the Northern Company, from time to time transfer to persons designated by that company to act as directors of either of the companies, shares in the stock of which are assigned by this instrument, a sufficient number of shares to qualify such persons as directors of such companies, under such conditions and restrictions as may be reasonably necessary to fully protect the rights of the parties hereto.

123 *Stocks Inalienable Except as Provided.*

SECTION 3. It being desirable that the railways and other facilities of each of the said railway companies named above in this Article, and the steamship line of the said Steamship Company, and the rights to the use of the facilities of the Saint Paul Union Depot Company, belonging to the Manitoba Company, shall be permanently retained as parts of the transportation system contemplated by the said resolutions of the Manitoba Company and the Northern Company, respectively, and by this instrument, the said shares of stock by this Article assigned and transferred shall be inalienable, during the term of the said lease, except as stated next below, that is to say:

Alienation Stocks—How and When Disposition Proceeds. (*See Art.* 1, *Sec.* 6.)

The said shares in the stock of either of the said companies may be pledged or mortgaged, with like assent of the Manitoba Company,

or may be sold, under like circumstances, limitations and conditions, and, in event of any such sale, the proceeds thereof shall be disposed of in like manner, as provided in Article I of this instrument respecting the sale and disposition of the proceeds of the sale of the said leased railways, and other real property.

124 *Disposition of Revenues of Stocks—Proxies, etc.*

SECTION 4. So long as the Northern Company shall continue to faithfully perform its covenants and obligations contained in this instrument, the Trustee shall pay over all revenues arising from the said shares by this Article assigned, to the Northern Company, from time to time, as the same shall be received by the Trustee, and shall, from time to time, at the request of the Northern Company, deliver to it all orders and powers of attorney needful or desirable for use by it in obtaining the said revenues directly from the said companies, respectively; and also such proxies as may be necessary to enable it to freely exercise the voting powers arising out of, or connected with, the said shares, according to its own discretion, with the limitation stated in the next succeeding section.

Alienation of Property—How and When Allowed.

SECTION 5. The Northern Company shall not, without the express and specific consent of a majority of all the directors in the board of directors of the Manitoba Company, given at a regular or a specially called meeting of such board, concur in, or suffer to be done, by means of any such proxy, or of any board of directors elected thereby, any act by either of the said railway companies, including the Minneapolis Union Railway Company, or by the Saint Paul Union Depot Company, whereby the railway or rail-
125 ways thereof, or any portion of the same, or any other real property of such company, necessary for the proper and efficient handling of the business of its railway or railways, or of its depots or terminal facilities, shall be alienated.

Northern S. S. Co.—Sale of Steamers, etc.—Disposition of Proceeds (Art. 1, Secs. 5 and 6).

Either of the said steamships of the said Steamship Company may, however, be sold by that company, with the assent of the Northern Company, and of the board of directors or executive committee of the Manitoba Company, whenever such vessel shall become disabled, or whenever for any other reason it shall not be deemed advantageous to the Steamship Company, or to the system of railways forming the subject of this instrument, to continue the running of the same; but, in event of the sale of either of the said steamships, the proceeds of such sale shall be paid over to the Trustee; and, unless the same shall, within a reasonable time, be reinvested by the Steamship Company, with the concurrence of the

Manitoba Company, and of the Northern Company, in other vessel property, for use in said steamship line, the same shall be applied by the Trustee, in the same manner as provided in Article I of this instrument with reference to the disposition of the proceeds of the sales of leased property, which shall not have been reinvested;

126 *Disposition Proceeds of Sale of Property of Railway Companies (Art. I, Sec. 6).*

And in event of the alienation, as hereinbefore provided, of the railway or railways or any part thereof, of either of the said railway companies mentioned in this Article, including the Minneapolis Union Railway Company, or of any other real property of either of the said companies, the proceeds of such sale shall, in the absence of liens thereon, by mortgage or otherwise, requiring the payment thereof to other parties, be paid over to the Trustee hereunder; and, unless such proceeds shall, within a reasonable time, be lawfully reinvested by the company which had owned and sold the property from which such proceeds arose, with the assent of the Northern Company, and of the Manitoba Company, given in the mode hereinbefore required for assent to the sale out of which such proceeds arose, in other railroad property convenient for use in the railway system by this instrument leased, such proceeds shall be used for retiring for cancellation the interest bearing debt of the company from sale of whose property such proceeds shall have arisen, forming a lien upon the property of such company; and the surplus, if any, shall be applied by the Trustee in the same manner as provided in Article I of this instrument, with reference to the disposition of the proceeds of the sales of leased property which shall not have been reinvested.

127 *Disposition of Moneys Arising from Governmental Expropriation.*

Moneys arising from expropriation under governmental authority, of either of the said steamships, or of the railway, or railways, or any part thereof, of either of the railway companies named in this Article, including the Minneapolis Union Railway Company, or of the real property, or any part thereof, of either of said companies, shall be disposed of as hereinbefore provided for the disposition of the proceeds of sales of such railways or property.

Disposition of Insurance Moneys.

Insurance moneys accruing to the Steamship Company, for loss of or injuries to any of the said vessels, and damages collected for destruction of, or injuries to, any of the same, shall be treated in the same manner as moneys arising from sales of said vessels, as above provided.

Marking, etc., Property of Companies Whose Stocks are Placed in Trust.

All locomotives, engines and cars, of all descriptions, also all other machinery, tools, implements, furniture and instruments, so far as may from time to time be required by the board of directors or executive committee of the Manitoba Company, belonging to either of the said railway companies in this Article mentioned, at the date hereof; also, all vessels, with their machinery, tackle, furniture and fittings, so far as may be required by the said
128 board or executive committee, belonging to the said Steamship Company at the date hereof; and all locomotives, engines, cars, machinery, tools, implements, furniture and instruments, and also all vessels, with their machinery, tackle, furniture and fittings, furnished as renewals or replacements as in this Article provided, shall have placed and maintained thereon names, letters or marks, as said board or executive committee may reasonably require, to indicate ownership thereof, by such railway company, or the said Steamship Company, as the case may be.

Sales of Portable Property—Disposition of—Reinvestment of Proceeds of.

Any item of fixed or portable property of either of the railway companies treated of in this Article, including the Minneapolis Union Railway Company, which shall have become obsolete, or unnecessary or unfit for use in connection with the railways, facilities or plant of such company, may, with the assent of the board of directors or executive committee of the Manitoba Company, be sold at a fair and reasonable price; and the proceeds of any such sale shall be disposed of in the manner herein provided for disposal of the proceeds of sales of the railways of the said companies, and of the other real property thereof necessary for the transaction of the business thereof; save that the proceeds of sales of portable property may be reinvested in other portable property, to be used in
129 connection with the railway or other plant of the company owning the same at the time of sale.

Maintenance of the Properties—Renewals, etc

SECTION 6. Unless relieved from so doing by the assent of a majority of all the directors in the board of directors of the Manitoba Company, to be given at a regular or a specially called meeting of such board, the Northern Company shall, during the term of this lease, operate, or cause to be operated, in a prudent, faithful and diligent manner, the railways and other plant and facilities of the several railway companies in this Article above mentioned, including those of the Minneapolis Union Railway Company, due regard being given to the development of the traffic and other busines

reof; and shall maintain and keep up, or cause to be maintained
l kept up, the said railways and other facilities, and the equip-
nt thereof, whenever, and as often as may be necessary, renewing
d replacing, or causing to be renewed and replaced, the same, and
several parts thereof, with others, at least as valuable and efficient
the uses for which the same were procured or kept, as those re-
aced thereby; so that the said railways, and all their appurten-
ces, and all and singular their tracks, terminals, stations, motive
wer, rolling stock, machine shops, water service, and all other ap-
rtenances and equipment, shall, at all times during the term of
this lease, be kept and maintained in a high condition and
0 state of efficiency, and at least equal in condition and state of
efficiency to that of the same existing at the date hereof.

pply of Additional Property (Real and Portable)—Title to Additions.

The Northern Company shall also, unless relieved from so doing
manner aforesaid, furnish and supply, or cause to be furnished
d supplied, all tracks, structures and plant, upon the property of
h of the said railway companies, including that of the Minneapolis
ion Railway Company, and also all equipment, machinery and tools
addition to the tracks, structures, plant, equipment, machinery
d tools, belonging to such other company at the date hereof, that
y, at any time during the term of the said lease, be required by
, or be needed for the prompt and efficient handling of the traffic
d transaction of the business of the railway or railways of such
npany, due regard being given to the volume of such traffic and
siness, and to the proper and prudent development thereof. All
h additional tracks, structures and plant, of a permanent nature,
aced upon property of either of the said other companies by the
rthern Company in pursuance of this section, shall become and
m parcel of the property owned by such other company; but the
terials in all tracks, structures and plant, merely temporary in
character, placed upon the property of either of the said other
1 companies, and all additional equipment, machinery and
tools of a portable nature, provided by the Northern Com-
ny in pursuance of this section, shall remain the property of the
rthern Company.

rthern Co. Assumes Liabilities of Companies Whose Stocks are Placed in the Trust.

SECTION 7. The Northern Company shall also, unless relieved
m so doing in manner provided in the next preceding section, pay,
cause to be paid, the principal and interest of all bonds, and of all in-
btedness of every other nature, of each of the railway companies in
is Article mentioned, including the Minneapolis Union Rail-
y Company, and of the said Steamship Company, outstanding
existing at the date hereof, or which shall be incurred or created

at any time hereafter during the term of the said lease, including all taxes and assessments of every description against the capital stock or the property, earnings or receipts of either of said companies, at or before the time when the same shall become due; so that no part of the railways, steamships or other property of either of the said companies shall be subjected to seizure or sale by judicial or administrative proceedings, to satisfy any such bond, indebtedness, tax or assessment; and shall also perform and satisfy, or cause to be performed and satisfied, all duties and obligations of every other nature, imposed by law upon the said companies, or either of them, at any time during the term of the said lease.

132 *Increase of Stock of Companies in the Trust.*

SECTION 8. In event of any increase in the capital stock of either of the companies in this Article mentioned, such additional stock shall be transferred to the Trustee, to be by it held and administered in the same manner as in this Article provided with regard to the shares of stock by this Article transferred to the Trustee, it being the intent of the parties hereto that no stock in either of the said companies shall, without the assent of a majority of all the directors in the board of directors of the Manitoba Company, to be given at a regular or a specially called meeting of such board, be issued or sold to any person or corporation, save to the Manitoba Company or the Northern Company.

Increase of Indebtedness.

The Northern Company shall not, during the term of the said lease, permit either of the said other companies treated of in this Article to increase its indebtedness secured by, or forming a lien upon, the property or franchises of such company, save for the purpose of extending, either by construction or purchase, the railways, properties, facilities, plant or equipment of such company; and for such purpose only to the amount of the fair and reasonable cost and value of such extensions, and with the approval first had and obtained of a majority of all the directors in the board of directors of the Manitoba Company, to be given at a regular or specially called meeting of such board.

133 ARTICLE V.

Land in Hennepin and Ramsey Cos.—Title to—St. Anthony Elevator Co.'s Contract.

SECTION 1. The title to the said parcel of land situated in Hennepin and Ramsey counties, Minnesota, now held by the Minneapolis Trust Company in trust for the Manitoba Company and the Saint Anthony Elevator Company, according to their respective interests, shall remain in said Trust Company until the same shall be disposed of in accordance with the terms of the contracts between the said

parties to such trust; but, while the Northern Company shall continue to faithfully perform and abide by its obligations contained in this instrument, all moneys accruing to the Manitoba Company from the revenues of said parcel of land, after deducting taxes and assessments, if any the Manitoba Company shall be required to pay, and the expense of protecting the title to the same, and of collecting the revenues therefrom, and of performing any other duties with reference thereto, imposed by law, if any there should be, or from the purchase thereof by the said Saint Anthony Elevator Company, as provided in the said contracts relating thereto, after making like deductions therefrom, shall, from time to time, as the same are received by the Manitoba Company, be paid over and belong to the Northern Company; and the Northern Company shall perform and comply with all covenants and obligations of the
134 Manitoba Company in the said contracts contained, relating to the performance of switching, transfer and other operating services for the said Elevator Company, and for others desiring to handle traffic to or from the elevator and warehouses of the said Elevator Company located on the said parcel of ground.

Title to Certain Properties Retained by Manitoba Co. for Benefit of Northern Co.

SECTION 2. The title to those other parcels of land hereinbefore referred to, that is to say:

The said Hotel Lafayette, and grounds appertaining thereto;

The said Minnetonka Beach Lands;

The said pine lands located in Mille Lacs county, State of Minnesota; and

The said sundry lots and unplatted lands included within sundry townsites, and not forming parts of any lands granted to the Manitoba Company or its predecessors in interest; shall be retained by the Manitoba Company; but while the Northern Company shall continue to faithfully perform and abide by its obligations contained in this instrument, all moneys accruing to the Manitoba Company from the revenues of the said parcels of land, if any, or from sales thereof, after deducting taxes and assessments against said property, if any, and the expense of caring for the same, and of protecting the title thereto, and of insuring and repairing any buildings, fences,
or other structures situated on said lands, and of performing
135 any other duties with reference thereto, imposed by law, shall, from time to time, as the same are realized by the Manitoba Company, be paid over and belong to the Northern Company.

ARTICLE VI.

Rental.

SECTION 1. As compensation and rental for the leases and transfers in this instrument made by the Manitoba Company to the Northern Company, the Northern Company shall, during the term

of this lease, well and faithfully make to or for the Manitoba Company the following payments, from time to time, that is to say:

Interest and Guaranties.

First. All interest, as the same falls due during the term of this lease, for which the Manitoba Company, or its property, is or may become liable, upon bonds now outstanding; also, all interest or dividends, as the same fall due during the term of this lease, upon any bonds or debenture stock which the Manitoba Company may, from time to time, with consent of the Northern Company, issue in exchange for bonds previously issued or guaranteed by the Manitoba Company; also, as the same falls due during the term of this lease, all further interest for which the Manitoba Company may hereafter become liable, either as principal or guarantor, with the consent of the Northern Company.

136 *Funds Specified.*

All such payments shall be made by the Northern Company in the coin or currency wherein such interest or dividends shall be payable, according to the instrument providing for the payment of the same; but the authorized delivery and surrender to the Manitoba Company of the cancelled coupons evidencing the right to receive any such interest or dividends, as the case may be, shall be equivalent to the payment of such interest to the amount of such coupons, in the coin or other currency required to pay the same.

Dividend on Manitoba Stock—Funds Specified.

Second. Quarterly, on the first days of February, May, August and November, respectively, in each year during the term of this lease, a sum of money, in gold coin of the United States, of the present standard of weight and fineness, equal to one and one-half (1½) per cent. upon the par value of all the capital stock of the Manitoba Company at the time outstanding, which par value shall never exceed the sum of twenty millions of dollars ($20,000,000). The said sum shall be paid, free from all taxes which either corporation may be required by any law to withhold from dividends declared on the Manitoba Company's capital stock, or to pay on account thereof; the said sum, when and as received by the Manitoba Company, to be by it faithfully used for the exclusive
137 purpose of paying, on each of the days aforesaid, a quarterly dividend of one and one-half (1½) per cent. upon the par value of all its capital stock then outstanding, free from all taxes which either the Northern Company or the Manitoba Company may be required by law to withhold therefrom, or to pay on account of such dividend.

Taxes.

Third. All taxes and assessments upon the property, gross earnings or income of the Manitoba Company, or for which that company or its property might be liable, levied or assessed, or falling due during the term of this lease, when and as the same shall become due and payable, all such payments to be made directly to the persons or officers lawfully entitled to receive or collect such tax or assessment, and in the coin or other currency in which the same are lawfully payable.

Expenses of Manitoba Co.

Fourth. On the first days of each month during the term of this lease, at its office in the city of St. Paul, the sum of one thousand five hundred dollars ($1,500), or such portion thereof as the board of directors or executive committee of the Manitoba Company shall require to be paid, to be used by the Manitoba Company for paying the expenses of maintaining its organization, and of the transaction of its necessary business.

138 *Interest—When to be Paid.*

The said payments on account of interest upon bonds and other indebtedness, and of interest or dividends upon debenture stock, shall be made at the places where such interest and dividends are made payable by the instruments providing for the payment thereof.

Dividends—Where to be Paid.

The said payments on account of dividends upon the stock of the Manitoba Company shall, at the request of the Manitoba Company, be made at some place in the city of Saint Paul or in the city of New York; and all payments of interest and dividends provided for in this Article shall, at the request of the Manitoba Company, be made by the Northern Company directly to the persons or corporations entitled to receive the same from the Manitoba Company, through some office or agency of the Northern Company at the place of payment; so that the Manitoba Company shall be relieved of all expense in connection with the making of said payments.

ARTICLE VII.

Northern Co. Assumes Manitoba Co.'s Indebtedness.

SECTION 1. The Northern Company hereby assumes and agrees to pay, as its own indebtedness, the principal and interest of all the said bonds issued by the Saint Paul and Pacific Railroad
139 Company, now outstanding; and also the principal and interest of all the said bonds issued by the Manitoba Company,

now outstanding; and also the principal and interest of all bonds, and evidences of debt of every other form, that may hereafter be issued by the Manitoba Company, for renewing, replacing or refunding the indebtedness evidenced by any of the said bonds now outstanding, or that may hereafter be issued by the Manitoba Company for any other purpose, at the request of the Northern Company; and the Northern Company shall hold the Manitoba Company harmless from any and all liability on account of the principal or interest of any of the said bonds now outstanding, or on account of the principal or interest of those hereafter issued in pursuance of the provisions of this instrument.

Northern Co. Assumes Manitoba Co.'s Guaranties.

SECTION 2. The Northern Company hereby assumes all liabilities and obligations growing, or that may grow, out of the several guaranties by the Manitoba Company of payment of the principal and interest of the said bonds heretofore issued by the Minneapolis Union Railway Company, or the Montana Central Railway Company, or the Eastern Railway Company of Minnesota; or out of the guaranty by the Manitoba Company of the payment of the principal and interest of any further issue of the bonds authorized by the said mortgage of the Minneapolis Union Railway Company, up to
140 the limit of three millions of dollars, fixed by said mortgage; or out of the guaranty by the Manitoba Company of the principal and interest of any bonds that may be issued hereafter by either of the said three railway companies, in renewal of, or for refunding, the bonds so previously guaranteed by the Manitoba Company, or any of them; or out of the guaranty by the Manitoba Company of any other issue of bonds, or evidence of indebtedness in any other form, that may be made at the request of the Northern Company; and the Northern Company shall hold the Manitoba Company harmless on account of any such guaranty.

Additional Minneapolis Bonds, Issuance Of.

SECTION 3. The Manitoba Company shall, at the request of the Northern Company, cause the proper steps to be taken by its board of directors for the issuance and guaranty, in the mode provided in the said mortgage heretofore executed by the Minneapolis Union Railway Company, of the remaining three hundred thousand dollars ($300,000) of bonds capable of being issued under said mortgage, whenever, and as fast as, additional issues of such bonds shall reasonably be required for raising funds for making necessary additions to the grounds, tracks, structures and other plant of the Minneapolis Union Railway Company.

141 *Consolid. Mortgage Reserved Bonds, Issuance of.*

The Manitoba Company shall also, at the request of the Northern Company, from time to time, issue bonds, forming part of the

nineteen million four hundred and twenty-six thousand dollars ($19,426,000) of bonds, by the terms of the said Consolidated Mortgage reserved for the purpose of retiring and replacing the said earlier issues of bonds of the Manitoba Company, as fast as it may become necessary or desirable to issue the same, for retiring an equal amount of bonds of said earlier issues now out standing, in view of the common interests of both companies; and to an aggregate amount not exceeding the principal of all the said bonds of earlier issues, hereafter retired with such Consolidated Mortgage Bonds, or the proceeds thereof.

Additional Consolid. and Mont. Ex. Bonds—Issuance of.

Nothing contained in this instrument shall be construed as preventing the issuance by the Manitoba Company, with the concurrence and at the request of the Northern Company, for the purposes contemplated, and under the conditions imposed by the said Consolidated Mortgage, and Montana Extensions Mortgage, respectively, of bonds secured by said mortgages, respectively, in addition to those heretofore issued, to the full limit of the amount fixed in
142 said mortgages, respectively; but no issue of bonds under either of said mortgages, increasing the aggregate principal sum thereof now outstanding, except issues made under the said provisions of the said Consolidated Mortgage, for the purpose of retiring the said prior issue of bonds, shall be made, except as authorized by a majority of all the directors in the Manitoba Company's board of directors, to be given at a regular or a specially called meeting of such board.

Additions to Property Subject to This Lease.

All railways and other railway properties acquired by the Manitoba Company, with such additional issues of bonds secured by the said Consolidated Mortgage or the said Montana Extensions Mortgage, shall, upon acquisition thereof, become subject to the operation of the lease in this instrument contained.

Extension or Renewal of Bonds.

The Manitoba Company shall also, at the request of the Northern Company, assent to extensions of the time limited for the payment of the principal of any of its indebtedness, payment whereof is herein assumed by the Northern Company, or to the renewal thereof by the issue of new bonds, secured by new mortgages upon the railways and railway property of the Manitoba Company, upon reasonable terms, and for any reasonable length of time, not exceeding the term of this lease.

143 *Limitation of.*

Provided, That such new bonds or other new evidences of debt shall not increase either the aggregate principal of the debt of the

85

Manitoba Company at the time outstanding or the aggregate interest charges thereof.

Execution of New Bonds, etc.

And the Manitoba Company shall, at the expense and request of the Northern Company, execute and issue all such new bonds or other evidences of debt, and all such new mortgages of its railways and railway property securing the same, as may be reasonably necessary for the economical and effectual accomplishment of such refunding operations, under such reasonable rules and regulations as it may see fit to adopt for the protection of its own rights and interests, and those of its stockholders, in the premises.

Current Assets and Liabilities.

SECTION 4. The Manitoba Company shall retain the said cash now in its hands, and its said other current assets, in its own possession, and shall collect and realize upon such assets as fast as practicable and economically may be; and, out of such cash, and the net proceeds of said other current assets, shall pay off and discharge its said current liabilities, to the extent of such cash and net proceeds.

Should any residue remain from the said cash, and the net
144 proceeds of said other current assets, after full payment of the said current liabilities, such residue shall be paid over to the Northern Company; but should the Manitoba Company fail, within a reasonable time, to realize sufficient net proceeds from said assets to fully pay off and discharge all said current liabilities, such deficiency shall, at the request of the Manitoba Company, be made good by the Northern Company; and, thereupon and thereafter, the net proceeds of all said current assets then remaining in the hands of the Manitoba Company unrealized, shall, as fast as realized, be paid over to the Northern Company, or, at the option of the Northern Company, such unrealized assets shall be turned over and transferred to the Northern Company.

Additional Liabilities of Manitoba Co., if Any, to be Assumed by Northern Co.

SECTION 5. It is believed by the Manitoba Company that it has no liabilities or obligations outstanding at the date hereof, save those hereinbefore in this instrument mentioned, and save claims for loss of and damage to property, and injuries to persons arising out of the maintenance and operation of its railways; but, should the existence of any other or additional liability or obligation of said company, or against its property, be made to appear, or hereafter during the term of the said lease arise from any act or omission of the Northern Company, or from any act or omission of any
145 other person or corporation maintaining or operating the railways hereby leased, or any of them, or any part of them,

ne payment, or the satisfaction of the same in other form, shall e assumed by the Northern Company, and the Northern Company hall save the Manitoba Company harmless on account thereof. And he Northern Company shall assume and bear the cost of the defense f any and all suits and other proceedings, growing out of or relatng to the construction, maintenance, or operation of the said railvays, or either of them, now pending or hereafter begun, against he Manitoba Company and shall, at its own cost, satisfy and perorm all final orders, judgments, and decrees therein; and shall also perform all duties at any time during the term of said lease imposed by law upon the Manitoba Company, as owner of its said railways, or of either of the same.

ARTICLE VIII.

Manitoba Co.'s Borrowing Power Limited.

While the Northern Company shall continue to fulfill and comply with its obligations in this instrument contained, the Manitoba Company shall not, without the request or consent of the Northern Company, exercise its borrowing or guaranteeing powers, or take any action whereby the principal or interest charges of any bonds heretofore issued or guaranteed by it shall be increased.

146

ARTICLE IX.

Manitoba Stockholders.

The stockholders of the Manitoba Company having, at the said adjourned annual meeting, also adopted the following additional resolutions, to-wit:

Refunding Resolutions.

"Resolved, That the directors or executive committee of this company be and they are hereby authorized to issue, as they may deem most expedient, either bonds secured by a general mortgage, or preferred or debenture stock, secured by mortgage or otherwise, or bonds in the nature and form of debenture stock, so secured, bearing interest or dividends not exceeding five per cent. per annum, payable semi-annually, to an amount not involving any greater interest charge than that for which this company now is or may become responsible, as principal or guarantor, upon bonds heretofore issued, or which may hereafter, with the consent of the said lessee, be issued; such new bonds or stock, and the proceeds thereof, to be applied first to the retirement of outstanding bonds, and next to the construction and equipment of railways belonging to this company;

Refunding.

"Resolved, That the directors or executive committee of this company be and they are hereby authorized to take up, on behalf of this company, either by purchasing for cash or by exchanging
147 for such new securities as they may issue under the foregoing resolutions, at such prices and on such terms as they may deem expedient, all bonds upon which this company is liable, either as principal or guarantor, to hold the same or to deposit them in trust with one or more trustees, under a suitable agreement for the protection of the rights of all parties, or to cancel them, whenever such cancellation may be deemed expedient and just to all parties; and that they be directed to retain an amount of such new securities sufficient for this purpose, until all such bonds shall have been taken up;

Extensions.

"Resolved, That the directors or executive committee be authorized, if so requested by the Great Northern Railway Company, and in a manner to be approved by it, to provide for the extension, in the interest of this company or of the Great Northern Railway Company, of railways connecting with this company's system, from some suitable point thereon in Montana, westward to or towards the Pacific coast, for such distance and over such route as the directors or executive committee may deem expedient, through the agency of some other company or companies, having the requisite powers to construct such extensions; and for this purpose, in the name of this company, to guarantee payment of the principal and interest of bonds or other securities of such other companies, properly secured by First Mortgages upon their railways, to such amount and on such terms and conditions, as to the board of executive committee may seem expedient;

148 *Deposit Other Stocks in Trust.*

"Resolved, That the directors or executive committee be requested to provide, by the terms of the lease to the Great Northern Railway Company, that the capital stock of all corporations, the indebtedness of which may be guaranteed by this company, at the request of the Great Northern Railway Company, shall be deposited in trust, in like manner with the railway and steamboat stocks now owned by this company, and shall be held as security to this company for the performance of all the covenants of the lease;"

Nothing contained in this instrument shall be construed as revoking or limiting the powers intended to be conferred upon the board of directors and executive committee of the Manitoba Company, by said resolutions. Nothing contained in this instrument shal- be construed as limiting the power of the Manitoba Company to issue, at the request of the Northern Company, for the purpose of constructing

one or more extensions of its railway system from a point or points on the same, or on the Montana Central Railway, in Montana, toward or to the Pacific coast, all such new and additional bonds or debenture stock, secured by lien upon the whole, or any part of its railways, or other property, as may be reasonably necessary for such purpose; such extensions, when built, to be owned by the Manitoba Company, and to be subject to the lease contained in this instrument.

149 ARTICLE X.

Land Grant—Disposition of Lands and Contracts.

The title to the said lands, granted to the Manitoba Company and its predecessors in interest by the State of Minnesota, as trustee of the United States, whether heretofore or hereafter conveyed to it, and also all outstanding contracts for sales heretofore made of portions of the same, which are subject to the liens and provisions of the Manitoba Company's said First Mortgage, and Consolidated Mortgage, shall be retained by the Manitoba Company, and shall by it be diligently and faithfully cared for and administered; and the unsold lands be sold and the said contracts for sale be enforced, as rapidly as consistent with the interests of both the Manitoba and Northern Companies; and the proceeds of all such past and future sales, after deducting the reasonably necessary expenses of perfecting the title to such lands, and of caring for and administering the same, including all taxes or assessments, if any, that shall be levied on the same, in addition to the tax upon the gross earnings of the said leased railways, which gross earnings tax the Northern Company has, by this instrument, assumed and agreed to pay, and of performing any other duties with reference thereto, imposed by law, and of collecting the proceeds of such sales, shall be, by the Manitoba Company, faithfully applied to the following uses, to-wit:

150 First. To the redemption and retirement for cancellation of outstanding bonds secured by the Manitoba Company's said First Mortgage, in manner provided in and by said mortgage.

Second. To the redemption and retirement for cancellation of outstanding bonds secured by the Manitoba Company's said Consolidated Mortgage, in manner provided in and by said mortgage.

Third. To the redemption and retirement for cancellation in order of priority, of any other outstanding bonds, or evidences of debt of the Manitoba Company, secured by lien upon the said lands, in manner provided by such bonds, or other evidences of debt, or by the instrument creating the lien securing the same; and, in absence of such provisions, by purchase in the open market, or by tender.

Fourth. To the redemption and retir-ment for cancellation, in order of priority, of any other interest bearing bonds, or evidence of debt of the Manitoba Company secured by lien on the Manitoba Company's property, in manner herein provided; and, in absence of such provisions, by purchase in the open market, or by tender.

Fifth. To the retirement and cancellation of outstanding shares in

the Manitoba Company's capital stock; such shares to be acquired by purchase in the open market; or by tender.

All such purchases of bonds or stocks for cancellation shall be made under such rules and regulations, and in such market,
151 as shall seem most likely to insure the lowest prices, and most favorable terms for the stocks and bonds to be purchased.

ARTICLE XI.

Offices for Manitoba Co.

The Northern Company shall, from time to time, assign to the Manitoba Company, for its use during the term of this lease, free of rent, or other expense to the Manitoba Company, office room, properly heated and lighted, suitable for the transaction of its business, in the office building in St. Paul, hereby leased to the Northern Company, or in such other building, in the same place, or elsewhere, as the Northern Company shall at the time be occupying for the transaction of the business of the system of railways hereby leased.

Access to Property.

The Northern Company shall also, at all times during the term of this lease, permit the officers of the Manitoba Company, and all agents appointed by it for the purpose, to have free access to all parts of the railways and all other property, hereby leased, including all stations, warehouses, machine shops, round houses, tool houses, and all other houses or buildings wherein are kept any of the equipment, machinery or tools, hereby leased, or any equipment, machinery, or tools supplied by the Northern Company in substitution for or in replacement of those hereby leased, as provided in this instrument,
for the purpose of examining into and ascertaining the con-
152 dition of such leased property; and the Northern Company shall also secure for the Manitoba Company, and its agents appointed for that purpose, like opportunity for examining into and ascertaining the condition of the railways and other property of the said Minneapolis Union Railway Company, Eastern Railway Company of Minnesota, Montana Central Railway Company, Willmar and Sioux Falls Railway Company, and Duluth, Watertown and Pacific Railway Company; and also for inspecting and examining the books, accounts and corporate minutes and records of the last named companies.

Transportation for Manitoba Officers and Agents.

And the Northern Company shall, during the term of this lease, permit all officers, agents and employes of the Manitoba Company, traveling upon the business of that company, to ride in the passenger trains of the Northern Company, free of charge, between any and all points on the system of railways hereby leased, and also between all points on any other railway operated by the Northern

ompany in connection with said system, at any time during the
rm of said lease, under such reasonable rules and regulations as
ie Northern Company shall see fit from time to time to adopt with
eference to such transportation.

53 ARTICLE XII.

St. P. and N. P. Contract for Exchange of Lands.

The Manitoba Company and the Saint Paul and Northern Pacific Railroad Company, having entered into sundry, contracts for the conveyance, by the one to the other, of sundry parcels of ground, within the city of Saint Paul, nothing contained in this instrument shall prevent the carrying out of such contracts, by the making and receiving of the several conveyances contemplated by such contracts, as freely and effectually, in all particulars, as if this instrument had not been made.

The several parcels of ground to be conveyed to the Manitoba Company by the terms of the said contracts, shall, when and as the title thereto becomes vested in the Manitoba Company, become subject to the operation of this lease, and any balance of moneys accruing to the Manitoba Company, from such exchanges and transfers, shall be paid into the sinking fund of the mortgage or mortgages forming the paramount lien upon the grounds that had been the subject of such transactions.

ARTICLE XIII.

Protection of Manitoba Co.'s Titles.

The Northern Company shall, during the term of this lease, at its own cost, faithfully protect the title of the Manitoba Company to all the property hereby leased, or intended to be; and, if, at
154 any time during the term of this lease, any defect or imperfection should be made to appear in the title of the Manitoba Company to any grounds or lands acquired or held by that company, for right of way, stations, yards, or any other purpose, in connection with the railways hereby leased, or to any other item of the property hereby leased, or intended to be, such defect or imperfection shall, so far as may be found practicable, be supplied by the Northern Company, at its own cost; it not being the intent of this instrument that the Manitoba Company shall warrant the title to any of the property, rights, or franchises, hereby leased or otherwise transferred, or so intended to be.

ARTICLE XIV.

Default.

In case at any time hereafter the Northern Company shall fail to make, in time and manner as in this instrument provided, any

of the payments of money which by this instrument it has assumed to make, whether such payments are to be made directly to the Manitoba Company or to the holder of any bond, obligation or other form of indebtedness, for which the Manitoba Company or its property or franchises are, or shall be, or might become, liable, as principal, surety or guarantor; or shall fail to perform or fulfill, or to cause to be performed or fulfilled, any duty or obligation imposed by law upon the corporation owning or operating the lines of railway hereby leased, or the railways of either of the other railway
155 companies, control of whose affairs will be acquired by the Northern Company, through the transfer of their outstanding stock to the Trustee by this instrument, for failure to perform or fulfill which duty or obligation the said railways, or any portion thereof, or any of their appurtenances or equipment, essential for the proper maintenance or operation thereof, or their franchises, would, or might, become liable to seizure or forfeiture, and such default shall continue for the period of six (6) months; or, in event of the Northern Company being or becoming in a state of declared insolvency, if such default shall continue for the period of sixty (60) days; or, if, at any time during the term of the said lease, the Northern Company shall fail or refuse to maintain and operate, or to cause to be maintained and operated, either of the railways, and the equipment thereof, which by this instrument it has agreed to maintain and operate or to cause to be maintained and operated, in manner by this instrument provided; and such default shall continue after the expiration of a reasonable time for compliance with the valid final award of any board of arbitrators, constituted and acting in pursuance of Article XVI of this instrument, or with the final order or judgment of any court of competent jurisdiction, requiring the doing by the Northern Company of the act or acts, the omission to do which shall have constituted such default; in any and every such case the Manitoba Company may, at its option, waive such default, or rescind the lease embodied in this instrument, and
156 all the other provisions thereof, in favor of the Northern Company, save those making absolute and unconditional sales and transfer of securities to the Northern Company; and re-enter into and resume possession, control and ownership, freed from any rights of the Northern Company, or its assigns, or its creditors, of all railways, properties, stocks and securities of every description, coming within the operation of this instrument, save such as shall have been previously mortgaged or sold with assent of the Manitoba Company, as hereinbefore provided, and also save the stocks and securities absolutely and unconditionally sold and transferred to the Northern Company, as aforesaid, and, also, save the materials in such temporary tracks and structures as may have been placed upon the grounds of the Manitoba Company by the Northern Company, and such portable equipment, tools and implements as may have been provided for use in connection with the leased railways, by the Northern Company, in pursuance of the requirements of this instrument, otherwise than as renewals of, or substitutes for, any of the same hereby leased; and the Trustee shall, in case of any such rescis-

ion lawfully made, upon request of the Manitoba Company, reas-
ign and surrender to it all the stocks and certificates for stocks de-
ivered or transferred to it, in pursuance of the provisions of this
nstrument, which shall not previously have been pledged, mort-
gaged or sold with the assent of the Manitoba Company, as herein-
before provided, together with all revenues therefrom, at the
157 time in possession or under control of the Trustee; and all
railways, properties, stocks and securities so repossessed by
the Manitoba Company, together with all properties, stocks, and
other securities at the time retained by it, subject to the provisions
of this instrument, shall thenceforth be free and clear of any and all
right and title of the Northern Company, or its assigns or creditors,
derived from or through this instrument.

The remedies reserved to the Manitoba Company by this Article shall be treated as cumulative only, and shall not deprive that company of the right to resort to any other that shall at the time be afforded by the laws, nor of the right to use such other remedies at its pleasure, simultaneously and concurrently with the remedies afforded by this Article, or otherwise.

The rescission by the Manitoba Company of the said lease shall not excuse the Northern Company from the obligation to pay any sum of money which had become payable by it prior to the date of such rescission.

In event of there remaining upon the grounds hereby leased, or upon the grounds of either of the said railway companies, possession of whose stock shall have been resumed by the Manitoba Company, as above provided, at the time of any such rescission, re-entry or resumption of possession by the Manitoba Company, any permanent tracks, structures or other improvements, placed thereon by the
Northern Company, for which it shall not have been pre-
158 viously paid, the same not having been provided in replace-
ment of or in substitution for other tracks, structures or improvements, existing on said property at the date hereof, the Manitoba Company shall pay the actual and fair value thereof, for use in connection with its said railway system, not, in any event, exceeding the actual original cost thereof to the Northern Company, with proper deductions for deterioration, if any there shall have been. Such payment shall be made:

Firstly. To the holder or holders of any lien or liens upon the leased property or upon the interest of the Northern Company in the same, or upon the property of said other companies, as the case may be, or upon any track, structure or other improvement situated thereon, for labor or materials furnished the Northern Company for maintaining, replacing or renewing the leased property, or the property of said other company, as the case may be, or for putting additional tracks, structures or other improvements thereon, to the amount of such liens; and

Secondly. To the Northern Company, to the extent of any residue remaining after payment of such liens.

The Manitoba Company shall, at its option, have a credit for all sums so to be paid, for a period not extending ten (10) years with

interest payable annually, at a rate not exceeding the average rate of interest upon its funded indebtedness at the time outstanding; and should it have no such indebtedness at the time outstanding, then at the average rate paid by other railroad companies in the same region, enjoying good credit, upon their funded indebtedness.

Any dispute arising between the parties interested, either concerning the value to the Manitoba Company of such tracks, structures or other improvements, or as to the rate of interest upon deferred payments of the sum representing such value, shall be submitted to, and decided by, arbitrators, in manner provided by Article XVI of this instrument.

Article XV.

Definition of Trustees.

It is understood and mutually agreed, by and between the parties hereto, that the word "Trustee," when and as used in these presents, except where some other meaning is plainly indicated, is intended to refer to and describe, and shall be construed to mean, the corporation or corporations, or the person or persons, which or who, for the time being, shall be charged with the execution of the trusts of these presents, whether the same shall be the party of the third part, or any successor or successors in said trust. And it is further mutually agreed, by and between the parties hereto, as a condition on which the party of the third part has assented, and does assent, to these presents, that the Trustee shall not in any manner be responsible or liable for any act, default or misconduct of any agent or agents by it employed; nor shall it be answerable, under any circumstances, except for its own wilful default or misconduct; and that the Trustee shall be entitled to just compensation for all services which it may hereafter render in said trust, to be paid from the trust funds which may come into its hands; or, in case of deficiency of the trust funds, by the Northern Company.

Article XVI.

Arbitration.

It is further mutually covenanted and agreed, by and between the parties hereto, that any and all questions that shall or may arise touching the construction of this contract or any part thereof, or the rights of the parties thereunder, or covering the business, or manner or mode of transacting the business to be carried on under the provisions thereof, upon which the parties cannot agree, shall be submitted to the arbitrament and award of a Board of three (3) disinterested persons, experienced in railway management, one to be selected by the Manitoba Company, its successors or assigns, and one by the Northern Company, its successors or assigns. If either party shall refuse or neglect to appoint an arbitrator within twenty (20) days

after written notice from the other of its appointment or an arbitrator on its part, the arbitrator so appointed by the party so giving such notice may, and shall, select and appoint a disinterested person, experienced in railway management, to act as arbitrator for, and on behalf of, the party so notified and refusing or neglecting to
161 appoint. The two thus appointed shall select a third, and the board so appointed shall hear and determine the matter in controversy, upon reasonable notice to both parties of the time and place of hearing, and the decision and award of said board, or of any two of them, in the premises, shall be binding and conclusive upon said parties, their successors and assigns, with respect to the matter submitted to and decided by them.

Article XVII.

Arbitration—Continuance of Business.

It is further mutually covenanted and agreed, by and between the parties hereto, that any difference or controversy that may in good faith arise between the parties hereto, as to the construction or carrying out of this contract, or the rights of the parties thereunder, or the transaction of business under the provisions thereof, shall not interrupt the performance of the contract or the continuance of business thereunder; but such business shall continue to be transacted, and settlements and payments made thereunder, in the same manner in which the same had been transacted and made prior to the arising of such difference or controversy; and thereupon such payments or restitutions shall be made by the respective parties as may be required by the decision of the arbitrators.

162 Article XVIII.

Termination of Lease.

At the expiration of the full term of the said lease, if the Northern Company shall, in the meantime, have well and faithfully fulfilled and performed its covenants, promises and obligations contained in this instrument; or, at that time shall not be in default in respect to any of the same; all and singular the said stocks vested in the Trustee by virtue of this instrument, or retained by the Manitoba Company, as hereinbefore provided, shall be delivered up, and transferred to it, the Northern Company, freed from any of the trusts created by this instrument, but subject to any liens at the time existing thereon, in favor of any party or parties other than the Manitoba Company.

Article XIX.

The provisions of this instrument shall be binding upon, and inure to the benefit of, the successors and assigns of the Manitoba and Northern Companies, respectively.

In Testimony Whereof, The said parties of the first part and second part have caused their respective corporate seals to be hereto affixed, and these presents to be signed by their respective presidents, or vice presidents, and secretaries; and the said party of the third part, to evidence its acceptance of the said trusts, and
163 for no other purposes, has likewise caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and secretary; on this first day of February, A. D. 1890.

THE SAINT PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY,
By JAS. J. HILL,
[CORPORATE SEAL.] *President.*

In presence of:
L. P. RICHARDSON,
JNO. O. GOODENOUGH,
As to Jas. J. Hill.

Attest: E. SAWYER, *Secretary.*

N. D. MILLER,
F. D. PONSONBY,
As to E. Sawyer.

THE GREAT NORTHERN RAILWAY COMPANY,
By W. P. CLOUGH,
[CORPORATE SEAL.] *Vice President.*

In presence of:
N. D. MILLER,
F. D. PONSONBY,
As to W. P. Clough.

Attest: EDW. T. NICHOLS, *Secretary.*

N. TERHUNE,
F. W. BABBITT.
As to E. T. Nichols.

164 CENTRAL TRUST COMPANY OF NEW YORK,
By E. FRANCIS HYDE,
[CORPORATE SEAL.] *Second Vice President.*

In presence of:
M. FERGUSON,
J. W. THORNE.

Attest: C. H. P. BABCOCK, *Secretary.*

(Duly acknowledged.)

Defendant's Exhibit 2.

Chapter 1.

An Act to execute the trust created by an Act of Congress entitled "An Act making a grant of land to the Territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State," and granting certain lands to railroad companies therein named.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

Section 1. All such persons as shall become stockholders in the company hereby incorporated, shall be and are hereby created and declared a body politic and corporate by the name and style of the Minnesota and Pacific Railroad Company, and by that name
165 shall have perpetual succession, and shall have and enjoy all the powers, privileges, franchises and immunities incident to a corporation; may acquire by purchase or otherwise, and hold, convey, sell and lease property and estates, either real or personal, or mixed, may make, have and use a common seal, and alter or renew the same at pleasure; may sue and be sued, plead and be impleaded, answer and be answered, defend and be defended against, contract and be contracted with, and shall never set up the defence of usury to any contract in any court, and generally may do and perform, all and singular the acts and matters which shall be necessary and conducive to the well being of said corporation.

Sec. 2. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, change the location of, reconstruct, maintain and operate, a railroad with one or more tracks or lines of rails on such route and with such alignment and graduation as said company shall think proper, from Stillwater, by way of St. Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, with a branch from St. Anthony, via Anoka, St. Cloud and Crow Wing, to St. Vincent, near the mouth of the Pembina River.

Sec. 3. The said corporation shall have the right to enter upon any lands for the purpose of making surveys and for the right of way, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding two hundred
166 feet in width throughout the entire length of its said railroads, may enter upon and take possession of, and use all and singular, any lands, streams and materials of every kind beyond the width of two hundred feet for the location and construction of depots and stopping stages, station grounds and houses, and for the purpose of constructing bridges, dams, embankments, excavations, spoil-banks, turnouts, engine houses, shops and other buildings, necessary for the constructing, completing, altering, maintaining,

preserving and complete operation of said railroads, all such lands, waters, materials and privileges belonging to the Territory or future state of Minnesota, are hereby granted to said corporation for said purposes, and this act shall be sufficient notice to all persons claiming any interest in the same, but lands owned or belonging to any person, company or corporation may be taken and appropriated for the purposes aforesaid, and shall be valued and paid for in the manner hereinafter provided.

SEC. 4. The capital stock of said corporation shall be five millions of dollars, divided into shares of one hundred dollars each, which shall be deemed personal property and may be issued and transferred in such manner and at such places as may be ordered and provided by the Board of Directors; who shall have power to require the payment of sums subscribed by the stockholders of such amount, in such manner, at such times and on such terms as they deem proper; and on refusal or neglect on the part of stockholders, or any
167 of them to make payment agreeably to such requisitions, the share or shares of such delinquents may, after thirty days' public notice, be sold at public auction under such rules as said Board of Directors may prescribe, the surplus money, if any remain after deducing the payments due, with interest, and the necessary costs of sale, to be paid to such delinquent stockholders. The Board of Directors hereby appointed shall cause books to be opened for the subscription to said stock in the city of St. Paul, upon the acceptance of this charter, of which notice shall be given by publication in two or more newspapers published in Saint Paul, and in one or more published in St. Anthony, and said books shall remain open ten days thereafter, and the said directors may thereafter also cause books to be opened in such manner and at such other places and times as they shall direct; and may, from time to time, increase the capital stock to an aggregate amount not exceeding twenty millions of dollars, whenever they may deem it expedient for the operations of said corporation to make such increase.

SEC. 5. All of the affairs of said corporation shall be managed by a Board of fifteen Directors, who shall be stockholders, and a majority of whom shall be citizens of the territory, and who are hereby invested with all the powers of said corporation; they shall be chosen annually by ballot by the stockholders, at the annual meeting of the company, which shall be held on such notice and at such time as shall be prescribed by the by-laws, and at such place as shall be prescribed by the Board of Directors and stated
168 in such notice. The votes shall be delivered in person or by proxy duly authorized, and in all cases in which stockholders shall vote, each share of stock shall be entitled to one vote, and in all elections for Directors, those stockholders equal to the number to be elected, having the greatest number of votes shall be deemed and declared duly elected. The elections shall be conducted in such manner as shall be prescribed by the by-laws of the company, and if from any cause an election of Directors shall not be had at the time when, by the provisions of this act or by the by-laws of said corporation it should be had, the same may be held

at any other time on notice, to be given as aforesaid; and until such election be had the Directors of the preceding year shall continue to act, and the corporation hereby created shall not forfeit nor lose any of its privileges, franchises or immunities by reason of the irregularity or want of such election.

SEC. 6. The following named persons are hereby appointed and shall constitute the first Board of Directors, whose term of office shall continue until an election shall be held and their successors duly elected as herein provided, viz.: F. R. Delano, William Willin, Alex. Ramsey, Edmund Rice, R. R. Nelson, Wm. L. Ames, Richard Chute, Henry T. Wells, Abraham M. Fridley, Dwight Woodbury, Franklin Steel, S. B. Lowry, J. D. Crittenden, Charles H. Oakes, Daniel Bassett, whose duties and powers shall commence and be in force from and after the passage of this Act.

169 SEC. 7. The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well-ordering, regulating and securing the affairs, business and interests of the company; provided, that the same be not repugnant to the Constitution and Laws of the United States, or the laws of this territory; and the Board of Directors shall have power to establish such rates of toll and charges for the conveyance of persons and property upon its said railroads as they shall from time to time direct and determine, and to change the same, and to levy and collect the same for the use of the said company. The width of track shall be four feet eight and a half inches, and the iron used in the track shall be of approved quality and pattern, and the railroad shall be completed, furnished and equipped in a style and of a quality equal to the average of other first-class western railroads. The construction of wheels, the form and size of cars, the weight of loads, the rate of speed, terms of running, connections with other railroads, and all other matters and things respecting the use of said railroads shall be in conformity to such rules and regulations as said Board of Directors shall from time to time determine and establish; provided, that at all crossings of the track of said railroad or branch with the track of any other railroad the engine or cars arriving at such
170 crossing shall come to a dead halt or stop before crossing the same. The said company shall have the right and authority to construct their said railroad and branches upon and along, cross, under or over any public or private highway, road, street, plank road or railroad if the same shall be necessary; but the said company shall put such highway, road, street, plank road or railroad in such condition and state of repair as not to impair or interfere with its free and proper use; and the said company shall have the right and authority to erect and maintain all the necessary bridges for the use of their said railroad over any stream of water or water-course, at such points of crossing, the same as they may locate the said road or branches, with all necessary abutments, piers, or other foundations; and said company shall have power to connect the said railroad or branches with any other railroad or branch thereof in this territory

or state, or in the State of Wisconsin, and to operate the same in connection with such other railroad or branch, under such name and on such terms as may be agreed upon by and between said companies, or to purchase from any other railroad company the whole or any part of any railroad or branch railroad owned by such company.

SEC. 8. A majority of the Board of Directors shall constitute a quorum for the transaction of business, and shall meet at such times and places, and be convened in such manner as they shall decide upon, and shall select one of their number to be President, and one to be Vice President. The President shall, when present,
171 preside at all the meetings of the board and of the stockholders, and when absent the Vice President shall discharge the duties of the President, and in case of the absence of the President and Vice President, the Directors may appoint a President *pro tem.* Shall have power to constitute an executive committee, and prescribe its powers and duties; to appoint a Secretary, Treasurer, and such Engineers, Superintendents, Agents and other officers as they may deem necessary; fix their compensation, and demand adequate security for the faithful discharge of their duties, and fill any vacancy which may occur in their own board.

SEC. 9. The Directors shall issue certificates to the stockholders for the number of shares subscribed for or held by them, respectively, in said corporation, signed by the President and Secretary, subject, however, to all the payments due and to become due thereon, which stock shall be transferable on the books of said company, in such manner and under such regulations as shall be provided by the by-laws of the company.

SEC. 10. At each annual meeting of the stockholders the Directors shall make a full exhibit and statement of the affairs of the company, and of their proceedings during the previous year; and special meetings of the stockholders may be called by order of the Board of Directors, or by stockholders holding one-fourth in amount of the capital stock, on like notice as that required for annual meetings, specifying the object of the meeting, and no business shall be
172 transacted at such special meeting except such as shall be particularly set forth in such notice, nor any vote taken unless a majority of all the stock of said company shall be then and there represented in person or by proxy.

SEC. 11. The said company is hereby authorized and empowered in its corporate capacity to borrow any sums of money from any person or persons, corporation or body politic of any kind, and for any rate of interest which may be agreed upon by and between said company, and any person or party of whom such loan may be obtained, any law on the subject of usury in this territory or future state, or any state where such transaction may be made, to the contrary notwithstanding; and to make, execute and deliver all necessary writings, notes, bonds, mortgages or other obligations and securities, in amount and kind as may be deemed expedient by said corporation, in consideration of any such loan, or in discharge of any liabilities which it may incur in the construction, repair, equip-

ment or operating said road; and the powers of the said company for the purposes aforesaid, and for all purposes necessary to carrying out the objects of said company, are hereby ratified and confirmed, and the contracts and official acts of said company declared binding in law and equity upon said company, and upon all other parties to said contracts.

SEC. 12. If said company shall not, within ten days from the passage of this act, accept the same by resolution, to be duly passed by the Board of Directors, and a certified copy thereof filed in
173 the office of the Secretary of the Territory, then the same shall be null and void, and if accepted, then the said company shall, within fifteen months from the first day of September next, grade and complete ready for the iron all that portion of said railroad from Stillwater by way of Saint Paul to Saint Anthony, and within nine months thereafter put in actual operation said road from Stillwater by way of Saint Paul to Saint Anthony, and thereafter the work on said line of railroad and branch shall be completed and put in operation at the rate of not less than thirty miles in each year and within ten years from the 3rd day of March, 1857, the whole of said railroad and branch mentioned in said act of Congress and hereby authorized to be constructed by said company shall be completed and in actual use.

SEC. 13. Whenever the line of said railroad and branches or any part thereof shall be located, and its route determined, the said company may apply to the Supreme, District or County Court in session, or any Judge thereof in vacation, for the appointment of three Commissioners to make an appraisal and award of the value of any and all lands, which are the private property of any person, on the line of said railroad and branches, or any division or part thereof which shall be designated in such application, and which the said company shall have entered upon, possessed, occupied or used, or which it may thereafter enter upon, take, possesses, occupy or use for any of the purposes for which by this act the said
174 company is authorized to enter upon, take, possess, occupy or use lands. The said company shall give notice of its intention to apply for the appointment of such Commissioners by publishing the same at least ten days before the time for hearing such application, in at least one newspaper published in the county in which such land shall lie, but in case no newspaper be published in such county, then in a newspaper published in the city of St. Paul, and upon an affidavit of the publication of the same, the court or judge to whom the application shall be made, shall appoint three commissioners who shall have cognizance of all cases arising on the line or route of said railroad and branch, or any division or part thereof, which shall be designated by said company in such application, and they shall proceed to examine the premises in each case separately, having first given such notice as they may deem reasonable to such owner, guardian or husband, and at least five days' personal notice to such owner if resident in the county, and whenever it shall appear to said company or its officers that the title of

such land is in dispute, or that several parties claim interest therein by tax sales, tax titles, incumbrances, liens or equitable claims, the said commissioners shall, upon request of said company or its officers, give notice to all persons claiming any interest in such land, whether as owners, incumbrancers, or otherwise, and when the person to be notified has no known residence in this Territory or State within the knowledge of such commissioners, the notice may be by publication in a newspaper for such length of time as the
175 commissioners shall deem reasonable, and after making such examination the said commissioners, or a majority of them, in each case separately, make an appraisement and award of the value of the land so entered upon, taken, possessed, occupied or used by said company for any of the purposes aforesaid, at the time when the same was so entered upon and taken, and shall deliver one copy of their award in each case to the said company, and shall file another in the office of the clerk of the Circuit or District Court of the county in which said lands shall lie, or of the county to which such county shall be attached for judicial purposes, with the costs of the award taxed upon each of said copies; and if neither party shall appeal from said award in the manner hereafter provided, the said Circuit or District Court, on motion of the party in whose favor any award shall be made, for such value as aforesaid, unless such award shall have been previously paid, shall enter up judgment in conformity with such award, and in case either of the said commissioners shall die, resign or decline to act, the Supreme, District or County Court, or Judge shall appoint another commissioner in his stead, and the said company or any party receiving notice from the said commissioners as aforesaid may, within thirty days after such award shall have been filed with the clerk, as aforesaid, appeal from the same to the Circuit or District Court for the county in which such award shall be filed by filing with the clerk of said court a written notice of such appeal, and upon receiving such
176 notice the said clerk shall enter the appeal as a case upon the docket of said court, setting down the owner or owners, and person or persons claiming any interest in said land, embracing all persons so having received such notice from said commissioners, as plaintiff, and the said company as defendants, and the said court shall proceed to hear and determine such case in the same manner that other cases are heard and determined in such court, and all issues of fact, arising therein shall be tried by a jury unless a jury be expressly waived by both parties, but the appellant shall not be entitled to have the case tried at any term of said court unless he shall have given notice to the appellee or his attorney, at least ten days before the first day of the term, that he will demand a trial at such term; but in case the appellee has no known residence in this Territory or State, or attorney of record residing therein, no such notice need be given; but in all cases the appellee may waive such notice, in which case the same rule for trial shall be applicable to it as to other cases in said court. After the hearing of such case to the jury, or if a jury be waived, the court shall assess the value

of the lands so entered upon, taken, possessed, occupied and used by said company, at the time when the same was entered upon and taken, and after such assessment the court shall proceed to render judgment against said company for the amount of said assessment in favor of the plaintiff or plaintiffs, in such case, and if the amount so assessed in favor of said plaintiff or plaintiffs shall exceed
177 the amount awarded by said commissioners, with interest at the rate of twelve per cent. per annum from the time of such award and the time of such assessment by the jury or court, then judgment shall be rendered against said company for costs; and when the appeal shall be taken by the claimant, and it shall not exceed such amount and interest as aforesaid, then judgment shall be rendered in favor of said company for costs, and when the appeal shall be taken by the claimant, and it shall not exceed such amount and interest as aforesaid, then judgment shall be rendered in favor of said company for costs, and against the said plaintiff or plaintiffs and execution may issue accordingly. Either party shall be entitled to a change of venue for the trial of such cause on affidavit filed stating the belief of the affiant that a fair trial cannot otherwise be had; the change of venue shall be to the nearest county where a fair trial can be had. The judgment of the said court may be reviewed on writ of error, as other cases at law. Whenever the commissioners shall make an award as aforesaid, and no appeal shall be taken from the same, or whenever in case of appeal a final judgment shall be rendered it shall be the duty of the company, and not before, to pay to the party entitled to the same the amount of said award or judgment; and in any case where there shall be any lien, incumbrance tax sale, tax title or equitable claim to or upon the land, or any part thereof, which is the subject matter of such award or judgment, or when more than one person shall be entitled to, or shall
178 set up any claim to the amount of such award or judgment, or any part of it; or when the person entitled to receive the same shall not have any known residence within the Territory or State, the said company may deposit the amount of such award, when there is no appeal, with the clerk of the court with whom the award in the case shall have been filed, and in case of an appeal and judgment thereon the company may deposit the amount of such judgment with the clerk of the court in which such judgment shall have been rendered, and the money so deposited in either case shall be paid over by order of the court to the person or persons who shall be adjudged by the court to be entitled to receive the same; and whenever the amount of such award or judgment shall have been paid, or tendered, or deposited as aforesaid an absolute estate in fee simple in such lands shall be and become vested in said company, as against all persons so receiving notice from the said commissioners as aforesaid, and all such persons as having received such notice shall be forever concluded from questioning such title so acquired by the said company, and the said company shall have full power and authority after entering upon and taking any such lands to have, hold, possess, occupy, use and enjoy the same for any of

the lawful purposes of the said company, from the time of such entry and taking until the proceedings contemplated by the act shall have been finally determined, and until said company shall have refused, after demand made, to pay the value of said land so ascertained as aforesaid; and they shall not during such time, nor until such refusal, be disturbed in such possession or occupancy, use or enjoyment by any proceedings either in law or equity.

SEC. 14. If any person shall wilfully and knowingly injure or destroy any part or portion of the railroads so to be constructed, or any works, building, or machinery, attached to or in use upon the same belonging to said company, or shall wilfully and maliciously place any obstruction or thing upon the track of said railroad, such person or persons so offending shall each of them, for every such offense, forfeit and pay to said company three times the amount of damages caused by such offense, which may be recovered in the name of said company by action of debt in any court having competent jurisdiction, and shall also be subject to indictment, and on conviction of any such offense shall be punished by fine and imprisonment, not exceeding ten years in the state prison, or either, at the discretion of the court; and in case any accident shall occur in consequence of any such obstruction or damages to said road or machinery whereby the death of any person shall be caused, the person so offending shall, on conviction, be adjudged guilty of murder in the first degree, and punished accordingly in such manner as shall be prescribed by the statutes for the punishment of murder in the first degree.

SEC. 15. The property of every person vested in the stock of said company shall be liable to be taken in execution for the payment of his or her debts, in such manner as if or may be provided by law, but no tax shall ever be levied on the stock shares of said company, except the yearly payment to be made by said company, as herein provided, and the shares held by any stockholder when taken in payment of any other debt or liability of such stockholder shall be subject to all indebtedness and claims of every kind in favor of said company against the holder of said stock, which indebtedness and claims shall be fully paid before said company shall be required to transfer said stock to any purchaser thereof, and before any such purchaser shall acquire any right or title thereto.

SEC. 16. For the purpose of aiding in the construction of the railroads hereby authorized, all the interest and estate present and prospective of this Territory, and of the future State which shall succeed it, in or to any or all the lands granted by the government of the United States to the Territory of Minnesota for the purposes of aiding in the construction of a railroad from Stillwater by way of St. Paul and St. Anthony, to a point between the foot of Big Stone lake and the mouth of Sioux Wood river, with a branch via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, to a point hereinbefore mentioned agreeably to the terms of an act of Congress entitled, "An Act making a grant of land to the Territory of Minnesota in alternate sections, to aid in the

construction of certain railroads in said Territory, and grant-
181 ing public lands in alternate sections to the State of Alabama,
to aid in the construction of a certain railroad in said state," approved March 3rd, 1857, together with all and singular the rights, privileges and immunities conferred or intended to be conferred by said act of Congress, are hereby granted to said Minnesota and Pacific Railroad Company, conditioned that said land shall be exclusively applied to the construction of that road for which it was granted; and provided, that the title of said land shall vest in the said Minnesota and Pacific Railroad Company in the manner following, that is to say: Whenever twenty or more continuous miles of said road shall have been located the Governor of the Territory or future State shall certify the same to the Secretary of the Interior, and thereupon the title to one hundred and twenty sections of said lands shall vest in the said company; and when twenty continuous miles of said road shall have been completed so as to admit of running regular trains on the same the Governor shall certify the same to the Secretary of the Interior, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said company, until said roads are completed; and it shall be the duty of the Governor so to certify to the Secretary of the Interior, whenever any such twenty miles are completed so as to admit of running regular trains of cars over the same, and the Governor shall in his official capacity and on behalf of the Territory or State, and under the great seal thereof, execute and deliver to the said Minnesota and Pacific Railroad Company, whenever it shall by virtue
182 of the provisions of this act be entitled to any of said lands,
a deed in fee simple of any and all of the lands to which said company shall be entitled.

SEC. 17. The location and designation of the route and line of said railroad and branch shall be made by said company, and reported to the Governor from time to time, and as fast as the same shall be definitely located and established, and the selection of the lands provided for by the act of Congress aforesaid, shall be made as soon thereafter as practicable, by said company, or such agents as it may designate, under the appointment of the Governor of the Territory or future State of Minnesota, such selections, as well as the survey of said roads and the compensation of such agents, shall be at the cost and charge of said company, without charges of any kind upon the Territory or future State, and said railroad so constructed by the application of the proceeds of the lands hereby granted, shall be and remain public highways for the use of the Government of the United States, free from any toll or other charge upon the transportation of troops and military property of the United States; and the United States mail shall be transported over said road and branch, under the directions of the Post Office Department, at such price as Congress may by law direct; provided, that until such price is fixed by law of Congress, the Postmaster General shall have the power to determine the same.

SEC. 18. In consideration of the grants, privileges and
183 franchises herein conferred on the said Minnesota and Pacific Railroad Company, the said company shall and will, on

or before the first day of March in each year, pay into the treasury of the Territory or future State, three per centum of the gross earnings of the said railroad, for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever; and for the purpose of ascertaining the said earnings an accurate account shall be kept by said company of all receipts and expenditures on account of the operation of said railroads, and abstracts thereof shall be furnished by said company to the Treasurer of the Territory or State, on or before the first day of February in each year, the truth of which shall be verified by the affidavits of the Secretary and Treasurer of said company; and for the purpose of ascertaining the truth of said affidavits, and the correctness of such abstracts, full power is vested in the Governor or any other person appointed as may be by law prescribed, to examine the books and papers of said company, and to examine under oath the officers, agents and employés of said company, and other persons, and if any person so examined by the Governor or other authorized person, shall knowingly and wilfully swear falsely concerning the matters aforesaid, every such person is hereby declared to have committed perjury; and for securing to the Territory or State the payment of the aforesaid per centum it is hereby declared that the State shall have a lien upon the railroads of the said company, and
184 upon all other property, estate and effects of the said company, whether real, personal or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company. The first payment shall be made on the first day of March next after fifty miles of said railroad shall be completed, and such payment shall be in lieu of all taxes and in full of all claims of the Territory or State for the grant hereby made, and in consideration of such annual payments the said company shall be forever exempt from all assessments and taxes whatever by the Territory or State which shall succeed the Territory, or by any county, city, town, village or other municipal authority in the Territory or State upon all stock in the said "Minnesota and Pacific Railroad Company," whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal, or mixed, held by said company, and said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company shall be exempt from all taxation till sold and conveyed by said company.

SEC. 19. The said "Minnesota and Pacific Railroad Company" shall have full power and authority to transport persons and property in boats, vessels, barges or other water craft, on any navigable water which any portion of its railroads may run to or connect with, and to receive and collect such tolls and charges therefor as said company shall from time to time fix and determine; and for that purpose may purchase, build and own such vessels, boats and barges, or
185 other water craft as it may require.

SEC. 20. The said Minnesota and Pacific Railroad Company shall be capable in law of taking and holding any lands granted by the Government of the United States, or of this Territory, or of

the future state, or by other parties, which shall be conveyed to it by this act, or by deed, gift or purchase, or by operation of law, and may mortgage, pledge, sell and convey the same, or otherwise dispose of all their right, title, interest, claim or demand of, in and to any such lands so granted to said company, and in any other estate, real, personal or mixed, of which said company may be seized, or which it may acquire subsequently thereto, in such manner and on such terms as the directors may think proper.

SEC. 21. The said company is hereby authorized and empowered in its corporate capacity to make, execute, issue and deliver its bonds or obligations in any amount which the directors may deem necessary or expedient; provided, that the faith of the Territory or future State of Minnesota shall be in nowise pledged for the redemption of said bonds, and that no banking privileges are hereby granted to said company; and the directors of said company are hereby authorized and empowered to prescribe the sum or sums for which each of said bonds shall be issued, the time or times and place or places, when and where the principal and interest of the same shall be payable, the person or persons, trustee or trustees, or corporation to whom
186 they shall be payable, and whether payable to order or to bearer, or how otherwise negotiable, the rate of interest which said bonds shall bear, and the manner and form in which the interest coupons annexed to them shall be executed, and to secure the payment of all or any of said bonds, the said company is hereby authorized and empowered in its corporate capacity to make, execute and deliver one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches, constructed or authorized to be constructed, and of the estate granted by the act, and any or all other of their estate, real, personal or mixed, in possession or expectancy; and said company is also hereby authorized and empowered in and by such mortgage or deed of trust to confer upon the trustee or mortgagee full and ample powers to enter into and upon and to take possession of, have, use and employ or to sell or dispose of the whole, or any part of said railroad and branches, and all corporate and other franchises, rights and privileges of the said company, and in case of any such sale, to grant and convey to the party or parties acquiring title under any such sale, and their associates, successors and assigns all and the same rights, privileges, grants, franchises, immunities and advantages in and by such mortgage or deed of trust enumerated and conveyed, which belonged to and were enjoyed by the said company, as fully and absolutely in every respect as the said company, its stockholders, officers and agents might or could have done if such sale or foreclosure had not taken place.

187 And the directors of said company are hereby authorized and empowered to prescribe by resolution to be by them adopted, all matters relating to the form and terms of any such mortgage or deed of trust, and of its execution and delivery; and they are authorized to provide for the periodical payment to such trustee or receiver as they shall appoint a certain sum to create a sinking fund with which to pay off and discharge at or before maturity any or all of the bonds by them authorized to be issued, and also to provide the

manner in which such trustee or receiver shall pay out or dispose of said sinking fund, and to authorize him to designate by lot, or any other suitable manner the bond or bonds to the payment of which said sinking fund or any part thereof shall be applied; and the said company is hereby fully authorized and empowered by its agents, or brokers, or otherwise, at any place to sell, loan, pledge, hypothecate or otherwise dispose of any or all of the aforesaid bonds hereby authorized to be issued, at par or at any price less than par, and for such sum or sums and on such terms as to the said company or its agents or brokers shall appear most for the interest of said company. And any such mortgage or deed of trust, and every discharge or satisfaction thereof, may be recorded in the office of the Secretary of the Territory or future State of Minnesota, in a proper book kept for that purpose, and the certificate of such recording endorsed on such mortgage or deed of trust shall have the same effect as if recorded in the several counties through which such road may run, or in
188 which said land may be, and such record in the office of the Secretary shall be sufficient notice to all persons.

SEC. 22. All the property which the said Minnesota and Pacific Railroad Company is authorized to take, possess, hold, use or enjoy by making payment therefor, as in this act provided, is hereby declared to be taken for public use, so soon as the said company shall so take, possess, hold or use the same.

SEC. 23. Every conductor, baggage-master, engineer, brakeman or other servant of such corporation, employed in a passenger train or at stations for passengers, shall wear upon his hat or cap a badge, which shall indicate his office, initial letters, or style of the corporation. No conductor or collector without such badge shall demand or be entitled to receive from any passenger any fare, toll or ticket, or exercise any of the powers of his office, and no other of said officers or servants without such badge shall have any authority to meddle or interfere with any passenger, his baggage or property.

SEC. 24. A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where said road shall cross any other road, and be kept ringing or whistling at intervals until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by said
189 corporation, one-half thereof to go to the informer, and the other half to the Territory or future State of Minnesota, and to be liable for all damages by reason of such neglect. Said corporation shall cause boards to be placed, well supported by posts or otherwise, and constantly maintained across each public road or street where the same is crossed by the railroad, on such elevation as not to obstruct the travel, and to be easily seen by travelers, and on each side of said board shall be painted in capital letters of at least the size of nine inches each, the words "Railroad Crossing! Look Out for the Cars!" But this provision shall not apply to streets of cities or villages, unless the corporation be required to put up such boards by the officers having charge of such streets. Said company shall construct and maintain a good, substantial board or rail fence, four and

one-half feet high, along said railroad in the line of the land by this act granted to them, and shall construct and maintain cattle-guards, wherever the same may be necessary, sufficient to keep cattle, sheep, horses and hogs from off the track of said railroad, whenever required by the Board of County Commissioners of the counties, respectively, through which said road shall pass, and shall be liable for all damages sustained by any person by reason of any neglect to keep and maintain such fence or cattle guard in good repair.

SEC. 25. Said company is hereby authorized and shall have full power to locate, construct and operate a railroad with one or more tracks from Winona up the Valley of the Mississippi river to St. Paul, and to extend its line of railroad from its terminus
190 at a point between the foot of Big Stone lake and the mouth of the Sioux Wood river to any point on the Missouri river north of the forty-fifth parallel of north latitude, and to increase its capital stock equal to the full cost of said road and extension.

SEC. 26. Said company shall also have power and authority to construct and operate a line of magnetic telegraph along any or all its railroads or branches in this Territory or future State of Minnesota.

SEC. 27. The Minnesota and Pacific Railroad Company shall not at any time consolidate with any railroad company owned or operated outside the Territory or State of Minnesota, without the authority of the Legislature of said Territory or State. All the railroads in this Territory shall be of uniform gauge or width of tracks, which shall be and is hereby established at four feet and eight and one-half inches.

SEC. 28. This act is hereby declared to be a public act, and shall be favorably construed to effect the purposes thereby intended, and copies thereof printed by authority of the Territory or State of Minnesota, shall be received as evidence thereof in all cases.

SEC. 29. This chapter one of this act shall take effect and be in force from and after the passage of this act.

Approved May twenty-second, one thousand eight hundred and fifty-seven.

191 DEFENDANT'S EXHIBIT 3.

At a meeting of the directors of the Minnesota and Pacific Railroad Company, appointed and constituted by the sixth section of an act of the legislative assembly of the territory of Minnesota, entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the state of Alabama, to aid in the construction of a certain railroad in said state,' and granting certain lands to railroad companies therein named," approved May 22, 1857, held in the city of St. Paul, Minnesota, on Monday, the twenty-fifth day of May, A. D. 1857, the following named directors attended, constituting a quorum of said board, to-wit: F. R. Delano, William Willin, Edmund Rice, R. R.

Nelson, William L. Ames, Richard Chute, Abraham M. Fridley, Dwight Woodbury, Franklin Steele and Charles H. Oakes.

Whereupon said first board of directors of the Minnesota and Pacific Railroad Company was permanently organized by the election of Edmund Rice to be president, and R. R. Nelson to be vice president, from their own number, and by the appointment of James W. Taylor to be secretary, of J. M. Stone to be treasurer, and of John B. Brisbin to be attorney of said company. The board of directors of the Minnesota and Pacific Railroad Company so met and organized as aforesaid, thereupon passed the following resolution:

192 "Resolved, that an act of the legislative assembly of the territory of Minnesota, approved May 22, 1857, entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the territory of Minnesota in alternate sections to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the state of Alabama to aid in the construction of a certain r-ilroad in said state,' and granting certain lands to railroad companies therein named," and the grants made by said act, so far as the same relate to or affect the interests of the Minnesota and Pacific Railroad Company, be and the same are hereby accepted and agreed to by the Minnesota and Pacific Railroad Company, upon the terms and conditions and according to the provisions in said territorial act contained.

We, Edmund Rice, president, and James W. Taylor, secretary of the Minnesota and Pacific Railroad Company, do hereby certify that the resolution last above set forth is a true copy from the minutes of the board of directors of said company so assembled and organized as aforesaid.

Witness our hands this twenty-seventh day of May, A. D. 1857, at St. Paul, in the territory of Minnesota.

EDMUND RICE,
Pres't M. & P. R. R. Co.
JAMES W. TAYLOR,
Secretary M. & P. R. R. Co.

[SEAL.]

E 44. Filed May 27, 1857.
(Duly certified by Secretary of State of Minnesota.)

193 DEFENDANT'S EXHIBIT 4.

Office of the Minnesota & Pacific R. R. Co.

ST. PAUL, *June 2nd*, 1858.

His Excellency, Henry H. Sibley, Governor of Minnesota.

SIR: I have the honor of notifying your excellency that the Minnesota and Pacific Railroad Company proposes to avail itself of the provisions of Section ten, of Article nine, of the Constitution of the State of Minnesota, as amended, and have accepted the conditions

thereof, by a resolution of its board of directors, this day adopted an attested copy of which I have the honor to enclose herewith.

I am sir, with great respect,

Your obdt. servant, R. N. NELSON,

Acting President Minnesota & Pacific R. R. Co.

E 45. Filed June 3, 1858.

At a meeting of the board of directors of the Minnesota and Pacific Railroad Company, held at the office of said company, in the city of St. Paul, on the 2nd day of June, A. D. 1858, the following resolution was unanimously adopted:

Resolved, that the amendment to Section 10, of Article 9, of the Constitution of the State of Minnesota, proposed to the people thereof by virtue of an act of the legislature of said state, entitled "An act proposing an amendment to Section ten, Article nine, of the Constitution, and providing for the submission of the same to
194 the people," approved March 9th, 1858, which said amendment was adopted and approved by the people as a part of the Constitution of the state, as appears by the proclamation of the governor of said State of Minnesota, of the 5th of May, 1858, and the grants made and conditions prescribed by said amendment so far as they relate to or affect the interests of the Minnesota and Pacific Railroad Company, be and the same are hereby accepted and agreed to by the Minnesota and Pacific Railroad Company upon the terms and conditions and according to the provisions in said amended Constitution prescribed.

We, Rensselear R. Nelson, vice president (in the absence of the president), and James W. Taylor, secretary, do hereby certify that the foregoing resolution is a true copy from the minutes of the board of directors of said company, duly assembled as above set forth.

Witness our hands and the seal of said company this second day of June, 1858.

R. R. NELSON,

Acting President Minnesota & Pacific R. R. Co.

[CORPORATE SEAL.] JAMES W. TALOR, *Secretary.*

E 46. Filed June 3, 1858.

(Duly certified by the Secretary of State of Minnesota.)

195 DEFENDANT'S EXHIBIT 5.

This Indenture, made this thirty-first day of July, in the year of our Lord one thousand eight hundred and fifty-eight, at New York, in the State of New York, between the Minnesota and Pacific Railroad Company, a body corporate, created by an act of the Legislative Assembly of the late Territory of Minnesota, hereinafter referred to, party of the first part, and Elon Farnsworth, of the State of Michigan, Edward I. Cowles, of the City of New York, and William H. Welch, of the State of Minnesota, parties of the second part,

trustees, as hereinafter mentioned, witnesseth, whereas, by an act of the Congress of the United States of America, approved on the third day of March, in the year of our Lord one thousand eight hundred and fifty-seven, entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said state," there was granted by the United States of America to the late Territory of Minnesota for the purpose of aiding in the construction of railroads from and to certain points and places mentioned in said act (to which act reference is hereby made for a particular description thereof) every alternate section of land designated by odd numbers, for six sections in width on each side of said roads and branches, except in
196 cases where it should appear that the United States had when the lines or routes of said roads were definitely fixed sold any of such sections or parts of sections, or that the right of pre-emption had attached to the same, and in such cases it was provided by said act of Congress that there should be granted to said territory, for the like purposes before mentioned, so much land nearest to the tiers of sections above specified, in alternate sections, or parts of sections, as should be equal to such lands as the United States may have sold, or otherwise appropriated, or to which the right of pre-emption may have attached; the same to be selected by any agent or agents, to be appointed by the governor of said territory or future state of Minnesota, subject to the approval of the Secretary of the Interior, and to be located not further than fifteen miles from the lines of said railroads or branches; and it being provided by said act that the lands thereby granted for and on account of said roads and branches, severally, should be exclusively applied in the construction of that road for and on account of which such lands were thereby granted, and should be disposed of only as the work progressed.

And whereas, the Legislative Assembly of the late Territory of Minnesota, by an act approved on the twenty-second day of May, in the year of our Lord one thousand eight hundred and fifty-seven, entitled "An act to execute the trust created by an act of Congress, entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections, to aid in the construction of cer-
197 tain railroads in said territory and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said state,' and granting certain lands to railroad companies therein named," did create the party of the first part hereto, a body corporate and politic, by the said name and style above given, and did constitute F. R. Delano, William Willin, Alexander Ramsey, Edmund Rice, R. R. Nelson, William L. Ames, Richard Chute, Henry T. Wells, Abraham M. Fridley, Dwight Woodbury, Franklin Steele, T. B. Lowry, J. D. Crittenden, Charles H. Oakes and Daniel Bassett, the first board of directors thereof; and did authorize and empower the said party of the first part to locate, construct, maintain and operate a railroad, with one

or more tracks or lines of rail, on such route as said party of the first part should think proper, from Stillwater by way of St. Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood river, with a branch from Saint Anthony via Anoka, Saint Cloud and Crow Wing to Saint Vincent, near the mouth of the Pembina river, the said railroad and branch being one of the railroads and branches specially mentioned in and provided for by said act of Congress and for the purpose of aiding in the construction of the said railroad and branch, did grant to said party of the first part all the interest and estate, present and prospective, of said territory and of the future state which should succeed it, in or to any or all of the lands granted by the gov-
198 ernment of the United States to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from Stillwater by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone lake and the mouth of Sioux Wood river, with a branch via Saint Cloud and Crow Wing to the navigable waters of the Red River of the North, to the point hereinbefore mentioned, under and by virtue of the act of Congress, approved on the third day of March, one thousand eight hundred and fifty-seven, hereinbefore referred to, together with all and singular the rights, privileges and immunities conferred, or intended to be conferred by said act of Congress, conditioned that said land should be exclusively applied to the construction of the road hereinbefore described, the title to all which lands was to be vested in said party of the first part, in various parcels from time to time in accordance with the provisions of said act of the Legislative Assembly of the late Territory of Minnesota, to which provisions reference is hereby made by said party of the first part, and subject to which this indenture is executed.

And whereas, the said party of the first part, by the eleventh section of said act of the Legislative Assembly of the late Territory of Minnesota, was expressly authorized and empowered in its corporate capacity to borrow money from any person or persons, corporation or body politic of any kind, and for any rate of interest which may be agreed upon by and between said party of the first part, and any person or party of whom such loan may be obtained, any law
199 on the subject of usury, of said territory or future state, or any state where such transaction may be made, to the contrary notwithstanding; and to make, execute and deliver all necessary writings, notes, bonds, mortgages or other obligations and securities, in amount and kind as might be deemed expedient by said party of the first part in consideration of any such loan, or in discharge of any liabilities which it may incur in the construction, repair, equipment or operating of said road, and by the twenty-first section of said act of the Legislative Assembly of the late Territory of Minnesota, the said party of the first part was further expressly authorized and empowered in its corporate capacity to make, execute, issue and deliver its bonds or obligations in any amount which the directors thereof may deem necessary or expedient, and to prescribe

the sum or sums for which each of said bonds should be issued, the time or times, and place or places, when and where the principal and interest of the same should be payable, the persons or persons, trustee or trustees, or corporation to whom or to which they shall be payable, and whether payable to order or to bearer, or how otherwise negotiable, the rate of interest which said bonds shall bear, and the manner and form in which the interest coupons annexed to them shall be executed; and for the purpose of securing the payment of all or any of said bonds, the said party of the first part was further, by said twenty-first section of said act of the Legislative Assembly of the late Territory of Minnesota, expressly authorized and em-
200 powered, in its corporate capacity, to make, execute and deliver one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches, constructed or authorized to be constructed, and of the estate granted by the said act of which said section was a part, and any and all other of its estate, real, personal or mixed, in possession or expectancy, and in and by such mortgage or deed of trust to confer upon the trustee or mortgagee full and ample powers to enter into and upon, and take possession of, have, use and employ, or to sell and dispose of, the whole or any part of said railroad and branches, and all corporate and other franchises, rights and privileges of the said party of the first part, and in case of any such sale to grant and convey to the party or parties acquiring title under such sale, and their associates, successors and assigns, all and the same rights, privileges, grants, franchises, immunities and advantages, in and by such mortgage or deed of trust enumerated and conveyed, which belong to and were enjoyed by said party of the first part, as fully and absolutely in every respect as said party of the first part, its stockholders, officers and agents might or could have done if such sale or foreclosure had not taken place; and the directors of said party of the first part were further, by said twenty-first section of said act of the Legislative Assembly of the late Territory of Minnesota, authorized and empowered to prescribe by resolution to be by them adopted, all matters relating to the form and terms of any such mortgage or deed of trust, and of its execution and delivery; and to provide for the periodical
201 payment to such trustee or receiver as they shall appoint, a certain sum to create a sinking fund with which to pay off and discharge, at or before maturity, all or any of the bonds by them authorized to be issued; and also to provide the manner in which such trustee or receiver shall pay out, or dispose of such sinking fund, and to authorize him to designate by lot, or any other suitable manner, the bond or bonds to the payment of which said sinking fund, or any part thereof, shall be applied; and the said party of the first part being further authorized and empowered by said twenty-first section of said act of the Legislative Assembly of the late Territory of Minnesota through its agents or brokers, or otherwise, at any place to sell, loan pledge, hypothecate, or otherwise dispose of, any or all of the aforesaid bonds, so as aforesaid authorized to be issued, at par, or at any price less than par, and for such sum or

COPY BOUND CL

sums and on such terms as to the said party of the first part, its agents or brokers, shall appear for its interest;

And whereas, the board of directors of the said party of the first part, after the passage of the said act of the Legislative Assembly of the late Territory of Minnesota, at a meeting held in the city of Saint Paul, Minnesota, on the twenty-fifth day of May, A. D. eighteen hundred and fifty-seven, permanently organized, by the election of Edmund Rice to be president, and R. R. Nelson to be vice president, and by the appointment of James W. Taylor to be secretary, of J. M. Stone to be treasurer, and of John B. Brisbin to be attorney
202 thereof, and after such organization by a resolution duly passed, accepted the afore mentioned act of the Legislative Assembly of the late Territory of Minnesota, approved on the twenty-second day of May, A. D. eighteen hundred and fifty-seven, and the grants thereby made, so far as they relate to or affect the interests of said party of the first part, upon the terms and conditions, and according to the provisions in said act contained, a copy of which resolution, certified by the president and secretary of said party of the first part, under its corporate seal, was on the same day deposited in the office of the Secretary of State of said Territory of Minnesota.

And whereas, the said party of the first part has deemed it advisable to provide for the issue and disposal, now and hereafter, of its bonds, sufficient to pay all present liabilities, and provide for the payment of the contract already entered into between it and Selah Chamberlin for the construction of fifty miles of its road, from Saint Paul to Saint Anthony and thence up the Mississippi river, via Anoka to Big Lake, and also the means for the further construction, completion and equipment of its said railroad from time to time, as shall be deemed prudent and expedient, and by the issue and disposal of such bonds to become indebted to various persons and bodies politic or corporate, who shall become the holders of said bonds or obligations;

And whereas, for the purpose of more effectually securing the said bonds, it is expedient that the party of the first part should ex-
203 ecute a mortgage or deed upon its property and franchises, as hereinafter specified in security for the payment of the principal and interest of said bonds, which said bonds so to be issued shall each be in the sum of one thousand dollars, and shall be regularly numbered and signed by the president and secretary of the said party of the first part and registered and countersigned by the parties of the second part hereto, trustees, and shall bear such rate of interest with coupons therefor, attached, as may from time to time as issued be decided upon, not to exceed the rate of seven per centum per annum, and shall all become due to the holders thereof on the first day of August, A. D. eighteen hundred and eighty-three, and are to be issued in series and in parcels from time to time as required for the purposes aforesaid, in the aggregate to the amount of twenty-three millions of dollars, or at the rate of, but not exceeding thirty-five thousand dollars for each mile of road, if found necessary as hereinafter specified, and are to stand equally and ratably secured by these

presents, according to the respective amounts, without any preference in respect to priority of date or time of issue.

Now, therefore, this indenture witnesseth, that the party of the first part, in consideration of the premises and of the sum of one dollar, in hand paid by the parties of the second part, the receipt of which is hereby acknowledged, and in order to secure the bonds to be issued as herein provided, and the interest thereon, and every part thereof, as the same shall from time to time become due and payable,
204 according to the tenor and effect thereof, and the coupons or interest warrants thereto annexed, hath granted, conveyed, transferred and assigned, and by these presents doth grant, convey, transfer and assign unto the said parties of the second part, as joint tenants, and not as tenants in common, and to their survivors or successors in the trust hereinafter expressed, the entire railroad of said party of the first part from Stillwater by way of Saint Paul and Saint Anthony via Minneapolis to the town of Breckenridge, on the Sioux Wood river, with a branch from Saint Anthony via Anoka, Saint Cloud and Crow Wing to Saint Vincent, near the mouth of the Pembina river, also all the railways, rails, bridges, fences, ties, spikes, culverts, right of way, station houses and other buildings, and such lands as are selected or actually in use for depot or station grounds, now held or owned or which may hereafter be held or owned by said party of the first part, for the purposes of constructing, operating and maintaining its said railroad, or the accommodation of the business thereof, also all the tolls, income, rents, issues, profits and alienable franchises of the said party of the first part, connected with its said railroad or relating thereto, also all the locomotive or stationary engines, tenders and cars of every kind, machinery, machine shops, tools and implements and materials connected with, or intended for the construction, equipment, operating and conducting of said railroad and branch hereby conveyed, or intended to be conveyed
205 now owned or hereafter to be acquired by the party of the first part, all of which are declared to be appurtenances and fixtures of said railroad, and are to be used and sold therewith, and not separated therefrom, and are to be taken as part thereof, and the party of the first part agrees to furnish to the parties of the second part, or the survivor of them or their successors, or the successors of such survivor, from time to time upon their or his reasonable request, a true and full inventory of all the movable property appertaining to said railroad, and the operation thereof, and which is transferred or agreed to be transferred by this indenture; but no default to demand or to furnish such inventory shall impair the operation or effect of this indenture upon all or any of the property herein agreed to be transferred.

To have and to hold the said granted premises unto the said parties of the second part, as joint tenants, and not as tenants in common, and their survivors or successors in the trust hereby created, on the trust and for the purposes following, that is to say:

First. If the interest on the bonds so to be issued shall not be paid by the party of the first part when the same shall fall due, and if there shall be no moneys in the hands of the parties of the second

rt out of which said interest may be paid in accordance with the
ovisions of this indenture, and if such interest shall remain in
rear- for six months, after having been demanded, or if there shall
be a failure to pay the principal of said bonds, or any of
06 them, or any part thereof, when due and demandable, ac-
cording to the tenor and effect thereof, then and in either case
shall be lawful for the parties of the second part, or the survivors
them, or his or their successors in the trust hereby created, to take
ssession of all and singular the said premises hereby conveyed, or
ansferred, or expressed, or intended so to be, and to cause the said
ilroad to be used and operated and kept in repair, and its business
nducted by themselves or such agents, superintendents, managers
id servants as they may appoint, and to apply the net income re-
ived therefrom to the payment, first, of the interest of said bonds,
id the surplus to the payment of the principal thereof, if any there
due. And at any time after such default, upon the request of the
olders of two hundred and fifty thousand dollars in amount of said
onds, upon being indemnified for their costs and expenses, said
arties of the second part or their successors under this indenture,
ay and shall enter upon and take possession of, or if already in
ssession, shall upon such request sell all and singular the said
remises hereinbefore and hereinafter conveyed and transferred, or
xpressed, or intended so to be, or only so much or such parts thereof
they shall deem necessary and proper, with a due regard to the in-
rests of all parties, first giving notice by advertisement in two daily
ewspapers printed in the cities of Saint Paul and New York, to be
ontinued for four months, or such shorter time, not less than forty
days, as the party of the first part may by resolution of its
07 board of directors assent to; and until such sale, may operate
the said railroad as aforesaid, being accountable for, and ap-
lying the income of said road as hereinbefore expressed; provided,
hat said parties of the second part may, if in their judgment the best
nterests of the bondholders shall require it, sell the same for cash, or
artly for cash and partly for credit, not to be extended beyond the
eriod of two years, and on receiving full payment for the same may
xecute to the purchasers a full and valid conveyance of all and sin-
ular the premises sold; and from the proceeds of said sale, or of the
peration of said road until sold, after deducting just allowances for
heir services and expenses, said trustees, parties of the second part
hereto, shall pay, first, the interest due and in arrear of said bonds,
nd next the principal thereof in full, or ratably so far as such pro-
eeds or income shall suffice, or if said sale shall comprise but a por-
ion of said premises, and after reasonable time and public notice
given, the holders of any of said bonds shall fail to apply for their
ratable proportion of the residue of such proceeds of such sale, the
same may be used in the purchase and cancelment of said bonds. For
ll charges and expenses of operating and maintaining said road, and
he management of said business, the said trustees shall be indem-
nified out of the proceeds of the sale of said road, if needful, as well
s out of the income thereof; in case any surplus shall remain in the

hands of the trustees, or trustee, the same shall be paid over to the party of the first part, its successors or assigns; provided, how-
208 ever, that if a majority in interest of said bondholders shall deem such sale unadvisable, or the time named for it unfavorable to the interests of said bondholders, and if they shall, in writing, request the trustees to delay such sale, said trustees shall postpone the same to such time, not exceeding twelve months, as may be named in said writing.

Second. It is agreed between the parties hereto that if for the nonpayment of interest or principal of the bonds as hereinbefore provided the said parties of the second part shall enter into and take possession of the premises herein conveyed or transferred, and shall cause said railroad to be operated, and its business to be managed, by themselves, that in such event, if at any time prior to the absolute sale of said premises, said party of the first part shall have paid or caused to be paid the interest and principal due upon all of such bonds, and all costs and damages that may have accrued in conveyance thereof, so that there shall be no longer any default or arrearage of interest or principal, then and in such case said sale shall not be made, but said parties of the second part shall surrender up and deliver to said party of the first part all of said railroad with its appurtenances so taken possession of by them, and shall pay over to said party of the first part the proceeds ensuing from the income of said road, after deducting a just allowance for their services and expenses, and all charges and expenses of operating and maintaining the said road and the management of said business.

Third. The party of the first part covenants with the
209 parties of the second part, and their successors in this trust, for the benefit of the holders of said bonds, that the party of the first part shall and will, at the reasonable request of the parties of the second part and their successors in the trust hereby created, make and execute all further assurances, conveyances and instruments, needful or proper to convey unto them, upon the trust and conditions herein contained, all the said premises expressed or intended to be granted as aforesaid, and all which may hereafter appertain to the said road.

Fourth. Until there has been a default in the payment of the interest or principal of said bonds so to be issued, or some of them, the party of the first part shall continue in the possession, management and control of all and singular the lands, railroad, premises, appurtenances and other property hereinbefore and hereinafter granted, together with the rents, income and profits thereof.

Fifth. It is understood and agreed, anything in this indenture contained to the contrary notwithstanding, that if it shall become expedient for the said party of the first part to sell or exchange or otherwise dispose of any of the real estate or grounds now held or owned by them, or which may hereafter at any time be held or owned by them for depots and station purposes, or for gravel pits, or on which any engine house, shops or other buildings designed for the use of said party of the first part in the operation of its railroad, or the accommodation of its business, are or may be erected the said
210 party of the first part, with the approval of the parties of the second part, has full power to sell, exchange, dispose of and

convey any such real estate or grounds; and the parties of the second part and their successors in this trust shall have power to release any such real estate or grounds so sold, exchanged or conveyed, provided, however, that all moneys or obligations received, in case of such sale shall be subject to the control of the parties of the second part as trust funds, so far as not reinvested for the use and accommodation of the road; and that all real estate hereafter acquired by said party of the first part, for the purposes aforesaid, in lieu or in exchange for such as may have been sold or exchanged, as aforesaid, shall become and be subject to the operation of this indenture, in like manner as if the same were herein specifically described, with like power of sale or exchange by said party of the first part, as in the case of real estate or ground now held or owned by them as aforesaid.

But it is expressly understood that until such power of sale or exchange is exercised by said party of the first part, all the real estate in this stipulation contemplated shall be and remain subject to the lien and operation of this indenture—nothing in this indenture contained shall be construed to prevent said party of the first part from disposing by sale or exchange from time to time of any part of the machinery, shop tools and rolling equipment and other personal property now owned or hereafter to be owned by said party of the first part, and acquired, either by purchase or
211 manufacture, which may become unsuited, unnecessary or impaired in value by use or require renewal, or which is not used by the said party of the first part; but all property purchased or manufactured by said party of the first part for its use or to replace that so sold or exchanged shall immediately to all intents and purposes become subject to the lien or operation of this indenture to the same extent as the property for which it was so exchanged or substituted.

And the party of the first part, for the consideration herebefore expressed, and for the more ample and perfect security for the payment of the bonds aforesaid, to be issued as herein provided and the interest thereon, and every part thereof, as the same shall from time to time become due and payable, according to the tenor and effects of said bonds, and the coupons or interest warrants thereto annexed, hath granted, bargained, sold, conveyed, assigned and confirmed, and by these presents doth grant, bargain, sell, convey and assign unto the said parties of the second part, as joint tenants, and not as tenants in common, and to their survivors or successors in the trust herein expressed, all the right, title, interest, claim or demand which the said party of the first part, now has or which it shall or may hereafter acquire or become entitled to, in or to all those sections or parts of sections of land granted to the late Territory of Minnesota by the act of Congress of the United States of America, the title to which is hereinbefore given, approved on the third day of
212 March, A. D. eighteen hundred and fifty-seven, for the purpose of aiding in the construction of a railroad from Stillwater by way of Saint Paul and Saint Anthony to a point between the foot of Big Stone lake and the mouth of the Sioux Wood river, with a branch via Saint Cloud and Crow Wing to the navigable

waters of the Red River of the North at such point as the legislature of said territory might determine, and which were subsequently granted to said party of the first part by an act of the late Territory of Minnesota, approved on the twenty-second day of May, A. D. eighteen hundred and fifty seven, entitled as hereinbefore stated, for the purpose of aiding the said party of the first part, in the construction of its railroad from Stillwater by way of Saint Paul and St. Anthony, via Minneapolis to the town of Breckenridge on the Sioux Wood river, with a branch from Saint Anthony, via Anoka, Saint Cloud and Crow Wing to Saint Vincent, near the mouth of the Pembina river, being in all about two million four hundred and sixty seven thousand and six hundred acres of land, be the same more or less, and situated in the present State of Minnesota, adjoining and adjacent to the line of the railroad of said party of the first part and its branch, as hereinbefore described, full lists of which will be appended to this instrument as said lands are surveyed, selected and certified, said lists to be signed by the president of the company and to be taken and considered as part and parcel of this deed without reference to the dates of said lists, together with all and singular the endowments, income and advantages, tene-
213 ments, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, at law or in equity, present or prospective, of the said party of the first part of, in and to the same and each and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the lands and premises hereby granted, or intended so to be, and each and every part and parcel thereof, with the appurtenances unto the said parties hereto, of the second part, and the survivors and survivor of them and their successors forever, as joint tenants, and not as tenants in common, for the uses and purposes in this indent*ure* set forth and declared, and subject to the provisions and requirements of the before mentioned act of Congress, and the said act of the Legislative Assembly of the late territory of Minnesota granting said lands to said party of the first part.

This indenture is executed and the conveyances and transfers as well of the aforesaid lands and interests in lands, as of the said line of road and its appurtenances are made to the said parties of the second part and accepted by them, upon the following terms, conditions and provisions:

First. No bonds shall be issued under this trust by the party of the first part hereto until registered and countersigned by the
214 said trustees, the parties of the second part hereto, nor shall any such bonds be a legal or valid obligation unless so registered and countersigned.

Second. It is agreed between the parties hereto that the said party of the first part, having already contracted for the construction and completion of fifty miles in length of its road, from Saint Paul to Saint Anthony, and thence up the Mississippi river via Anoka to

Big Lake, may now proceed to execute and dispose of a first issue of its bonds, for the purposes aforesaid, to the amount of one million seven hundred and fifty thousand dollars, being at the rate of thirty-five thousand dollars for each mile of its road, so as aforesaid contracted for, the same to be registered and countersigned as before stated. And it is understood and agreed between the parties hereto that the said party of the first part may at any time hereafter, so often as the construction of a section of its said railroad or its branch of forty miles in length, additional to the said fifty miles now under contract, shall be contracted for, make further issues of its bonds for the purposes aforesaid to an amount not exceeding thirty-five thousand dollars for each mile of every section of forty miles so to be contracted for, and so on as the work progresses, and until the final completion of said railroad and its said branch.

Provided, however, that the total issue of said bonds, including the said amount of one million seven hundred and fifty thousand dollars now authorized to be issued shall not exceed the sum
215 of thirty-five thousand dollars for each mile of the said road and its branch. Provided, further, that all of said bonds shall first be countersigned and registered by said parties of the second part, their survivors or successors, before the same or any part thereof shall be issued.

Third. All moneys, after deducting the expenses of executing this trust arising from the sales of said lands, are hereby sacredly pledged to the payment of said bonds, so to be issued and of the interest coupons and warrants thereon. And all such money shall be applied by said parties of the second part, from time to time, as they shall receive the same, first to the payment of the interest coupons or warrants annexed to said bonds, as fast as the same shall become due and payable; second, in purchasing and cancelling such outstanding bonds as can be obtained at their market value, not exceeding however, a premium of ten per cent. and third, to the payment of such of the bonds themselves as may not have been purchased in accordance with the foregoing provision, when the same shall become due and payable, but it is understood and agreed that all the current net earnings and income of the road of said party of the first part, after deducting current expenses shall be appropriated and used from time to time if necessary in the payment of the interest on said bonds;

Fourth. If there shall, at any time, be a default in the payment of interest or principal upon said bonds, and continue for six months after the same shall become due, the parties of the second
216 part are authorized and empowered in their discretion to sell at public auction after notice published for three months, in one or more newspapers in New York, Saint Paul and such other place as they may designate so much of said lands as shall be necessary to pay and satisfy such liabilities; or they may proceed as hereinbefore provided. And if sufficient money shall not be realized from such sales of land, then said parties of the second part may proceed in the manner hereinbefore provided, to sell the entire road

and franchises, or other property or lands or so much thereof as may be necessary to pay and satisfy such bonds, or so much as may be due thereon.

Fifth. All the trust moneys which shall come into the hands of the parties of the second part, until the same shall be used or applied in accordance with the provisions herein contained, shall be invested in Minnesota State Bonds, bearing seven per cent. interest—the interest on such investment to be applied in payment of the interest accruing on the bonds of this company—and the state bonds to be retained as an offset to the bonds of this company till they shall become due or exchanged for the same, as shall best advance the interests of the company and the bondholders.

Sixth. Said lands thus granted, as aforesaid, except the portion thereof occupied and used, or that may now or hereafter be required to be used and occupied for the roadway, depots and other purposes incident and convenient to the proper working of said
217 road, shall be carefully valued and appraised by the said party of the first part, its officers and agents, in divisions and parcels, as may seem to them most expedient for effecting a sale thereof, which allotments and valuations shall be made in writing from time to time as may be found convenient, and practicable, and shall be subject to the approval of said parties of the second part; and upon such approval, duplicates thereof shall be deposited and filed with the parties of the second part, and also with the treasurer of the party of the first part; which said allotments and valuations may be varied and changed from time to time by the party of the first part, as the value of the lands may be enhanced or depreciated.

Seventh. The party of the first part shall at all times be at liberty to contract for the sale of any parcel or parcels of said land, at such prices as to them shall appear fair and reasonable, and shall receive in payment thereof cash or any of the bonds aforesaid, at the par valuation thereof; and upon the payment of such cash or surrender of such bonds to said parties of the second part, said parties of the second part shall by proper deeds or instruments executed by them, or their duly authorized agent or attorney, grant and convey, such parcel or parcels of land to the purchaser or purchasers thereof, by full and sufficient deeds in terms of general warrantee and said deeds shall invest said purchasers with the complete title, free and clear of all incumbrances on account of the issue of said bonds, and shall include, as well the title of the company, as of the trustee
218 aforesaid. Whenever any of said lands shall be paid for in full, if in money said money, shall at once be invested in the bonds of the company and if with bonds, said trustees shall enter on the face of the deed given for every piece or parcel of land, the number and series of the bond or bonds which have been cancelled in payment for such land, and shall also endorse on the bond or bonds the particular tract, piece or parcel of land in payment for which said bond or bonds were cancelled. The same course shall be pursued where any part of said lands are paid for in the bonds of the company, provided however, that where the bonds of the

company can not be procured such reference shall be made to the state bond purchased in lieu of such bond of the company, and when the state bond is surrendered in payment for the bonds of the company such endorsement shall be made on such bond of the company, which shall then be cancelled.

Eighth. The parties of the second part shall have full power, from time to time, to employ such clerks and assistants as they shall find necessary to enable them to discharge properly the duties devolving upon them under the provisions of this instrument, and they shall also have power and be at liberty to appoint an agent or attorney to execute conveyances of said lands, and to act generally in their behalf, and from time to time to remove such agent and appoint another in his place, and all conveyances executed by such agent or attorney, and other acts performed within the scope of his power, shall be legal and valid, in the same manner as
219 if executed or done by the parties of the second part.

Ninth. After all the bonds have been paid and liquidated, and the interest thereon fully satisfied and paid, for the payment and liquidation of which this trust has been created, and not till then, said trust shall cease and determine, and every matter and thing therein contained shall become utterly null and void, and all property and estate and equitable interests then held or claimed by said trustees under this deed shall at once revert to and reinvest in said company as fully and perfectly as if this deed of trust had never been executed; provided, however, that three months' public notice of the cessation of said trust shall first be given in at least two daily papers published in the state of Minnesota, and in the city of New York.

It is distinctly understood and agreed that all the grants and transfers by this indenture made are made to and accepted by said parties of the second part, subject to the lien now held, or which may hereafter be acquired by the state of Minnesota, upon the net profits of the railroad of the said party of the first part, and also upon the first two hundred and forty sections of the land so as aforesaid granted to said party of the first part which it may be authorized to sell under and by virtue of the provisions of the acts of Congress and of the Legislative Assembly of the late territory of Minnesota hereinbefore cited as security for the payment and redemption of the bonds of the state of Minnesota which may be issued
220 and delivered by said state to the said party of the first part under and by virtue of the provisions of an act of the legislature of said state, approved on the ninth day of March, A. D. eighteen hundred and fifty-eight, entitled "An act proposing an amendment to section two, article nine of the constitution, and providing for the submission of the same to the people," and also for the payment of the interest on said bonds, provided, however, that the total amount of said state bonds, in favor of which said prior lien is hereby acknowledged shall not exceed in the aggregate the sum of twelve hundred and fifty thousand dollars.

It is mutually agreed as the condition on which the parties of the second part have assented to these presents, that they shall not be

responsible for the acts or defaults of each other, nor for the fault or misconduct of the agents by them employed, and shall be bound to the exercise of ordinary diligence only.

And it is further provided that in case a vacancy shall happen in the number of trustees by death, resignation, removal, permanent disability or otherwise of one of said trustees, or their successors from time to time, the remaining trustees shall while said vacancy exists have all the rights, exercise all the powers and discharge all the duties devolving on all the said trustees by this instrument, but as soon as it conveniently can be done such vacancy shall be filled by the nomination by the remaining trustees of some proper person to fill such vacancy, which nomination shall be made and presented by said remaining trustees to the Supreme or Superior Courts
221 in the city of New York, or to the Supreme or any District Court of Minnesota, twenty days' previous notice, in writing, of which nomination shall be given to the president of said party of the first part, and, if such nomination shall be approved by the court, the person so nominated and approved shall at once become a trustee under this instrument. If such nomination is not approved by the court to which it shall be made, another person shall be nominated by said remaining trustees with like notice as aforesaid, and so on until a nomination is made which shall be approved; provided, however, that at least one of said trustees shall always be a citizen of the state of Minnesota.

Any trustee may resign his trust, and thenceforward be discharged from all further duty and obligation in relation to it, provided that such resignation shall not take effect until after at least sixty days' notice in writing shall have been given to the president or secretary of said party of the first part.

And it is further provided that a majority in interest of the holders of bonds issued in pursuance hereof and outstanding at any time may, whenever they think proper, apply to either of the aforesaid courts for the removal of either or all of said trustees, or their successors, and for the appointment of some other suitable person or persons in their stead and the person or persons that may be so appointed by the court, on the application of said bondholders, upon a certified copy of the order of court asking such appointment or appointments being filed with the secretary of said party
222 of the first part, shall become a trustee or trustees under this instrument, and from thenceforth this grant shall operate in favor of the person or persons so constituted and appointed trustees to the same extent as this indenture operates in favor of said parties of the second part named herein; and said person or persons thus appointed shall notify the party or parties of the second part hereto of his or their said appointment, either personally or through the post-office, by letter properly directed, and such person or persons thus appointed trustees shall thereafter possess all the powers, rights, privileges and estate vested by this instrument in the said party or parties of the second part, as the case may be, and shall become his or their successor or successors to all intents and purposes whatsoever.

The said party of the first part will from time to time pay to said

trustees a fair compensation for the services rendered by each and all such costs, charges and expenses as they may sustain or be put to in the execution of this trust, and keep them fully indemnified in the premises, or, failing to do so, said trustees may pay themselves, out of any moneys which may come into their hands.

Any act or thing required by this indenture to be performed by the parties of the second part, or their successors, shall be valid and binding, if done or performed by any two of their number, except the appointment of agents and attorneys to convey land, which shall be the joint act of all the trustees for the time being and may be revoked at any time by any one of said trustees.

223 In witness whereof, the parties to these presents have hereunto, and to three other original indentures of the same tenor and in all respects as this, interchangeably set their seals (the party of the first part its corporate seal), and have signed the same, the party of the first part by its president and secretary, the day and year first above written.

THE MINNESOTA & PACIFIC RAILROAD COMPANY.
By EDMUND RICE, *President.*

[Corporate Seal.]

JAMES W. TAYLOR,
Secretary Minnesota & Pacific R. R. Co.
ELON FARNSWORTH. [SEAL.]
EDWARD P. COWLES. [SEAL.]
WILLIAM H. WELCH. [SEAL.]
Trustees.

Executed and delivered in presence of:
On page six, line twenty-seven, the words "may and" written over erasure and on page nine, line thirty-seven the words "said party of the" erased before the execution of this instrument.
JOHN M. BARBOUR.
WM. R. L. WARDE.

(Duly acknowledged.)

DEFENDANT'S EXHIBIT 6.

This Indenture, made and concluded at St. Paul in the State of Minnesota this twenty-fifth day of October, one thousand eight hundred and fifty-eight, by and between the Minnesota & Pacific
224 Railroad Company, a body corporate *and* created by an act of the Legislative Assembly of the late territory of Minnesota, party of the first part and the state of Minnesota, party of the second part, witnesseth:

That Whereas by an amendment of the constitution of the state of Minnesota approved by the people thereof on the fifteenth day of April, A. D. 1858, a loan of the state credit was provided to be made by said state to certain railroad companies in manner following to-wit: "The credit of this state shall never be given or loaned, in aid of

any individual, association or corporation, except that for the purpose of expediting the construction of the lines of railroads in aid of which the Congress of the United States has granted lands to the territory of Minnesota, the governor shall cause to be issued and delivered to each of the companies in which said grants are vested by the Legislative assembly of Minnesota, the special bonds of the state bearing an interest of seven per cent. per annum, payable semi-annually in the city of New York, as a loan of public credit to an amount not exceeding twelve hundred and fifty thousand dollars or an aggregate amount to all of said companies not exceeding five millions of dollars and whereas, it is further provided, *inter alia*—in said section ten of article nine of the constitution that the governor of the state shall cause the said state bonds to be issued upon the compliance by said railroad company with certain conditions precedent among which is enumerated the following, to-wit: "The governor shall demand and receive from each of the companies before any of said bonds are issued, an instrument pledging the net profits of its road for the payment of said interest.

Now, therefore, the said Minnesota & Pacific Railroad Company party of the first part, for the purpose of pledging to the state of Minnesota, the party of the second part hereto, the net profits of the railroad of the said party of the first part, pursuant to said section ten, of article nine of the constitution, doth hereby obligate and bind itself in consideration of the premises and of the sum of one dollar, paid by the said party of the second part, to said party of the first part, the receipt whereof is hereby acknowledged, to pay or cause to be paid to the treasurer of the state of Minnesota, party of the second part, who is herein and hereby constituted and appointed the fiscal agent of said party of the first part, and the party of the second part, for the purpose of receiving and paying out the same pursuant to the provisions of this instrument, at least twice in each and every year, that is to say on the first day of April and the first day of October in each and every year, all and singular the net profits of said road of the said party of the first part, known as the "Minnesota and Pacific Rail Road" which may have been received by the said party of the first part in operating and running said aforesaid railroad, until the bonds of the said party of the second part, to be issued to said party of the first part as provided in said amendment to the constitution of the state of Minnesota as aforesaid, shall be paid, cancelled and annulled. And it is further agreed and stipulated, by the parties hereto, that whenever the party of the first part shall provide and pay to the treasurer of the state of Minnesota, party of the second part, the fiscal agent of said parties hereto as aforesaid, at least 60 days prior to the first days of the months of June and December of each and every year, until the bonds to be issued by said party of the second part to said party of the first part, shall have been paid, cancelled, and annulled, as aforesaid, a sum of money sufficient to pay the interest warrants attached to the said bonds of the State of Minnesota, which may have been issued to the said party of the first part, said interest warrants maturing and being payable upon the first day of the months of June and December in each and every year aforesaid, or shall pay

the interest coupons attached to the bonds of said party of the first part, deposited with the governor of the state of Minnesota, party of the second part, as security for said bonds of the said party of the second part issued to said party of the first part, as the same shall mature and become payable; then such payment to the treasurer as aforesaid, of the state of Minnesota, party of the second part, shall be deemed and held to be the net profits of the railroad of the party of the first part for and during the six months immediately preceeding said first days of the months of June and December of each and every year aforesaid. It is further stipulated and agreed by the parties to these presents, that
227 the amount of net profits of the said railroad of the party of the first part hereto, shall be ascertained by the certificate under oath of the president, treasurer and two directors of the said "Minnesota and Pacific Railroad Company," but nothing herein contained shall be so construed as to prevent the said party of the second part, by the governor of said state, or his duly authorized agent from examining the books and records of the said party of the first part, and for the purpose of such examination of the books and records of said party of the first part, said party of the first part hereby agrees and covenants to submit all their books and records at the place where the same are usually kept, to the governor of said state said party of the second part, or to his duly authorized agent, whenever they are requested for such examination. And any refusal, on the part of the party of the first part, to these presents to submit its books and records to the governor of said state or to his duly authorized agent for examination shall be deemed, *prima facie* evidence of fraud upon the part of the president, treasurer and director of the "Minnesota and Pacific Rail Road Company" party of the first part, in certifying the amount of the net earnings of said road, during the time from which such certificate purports to give the same. And it is further mutually stipulated and agreed by the parties to these presents, that upon the payment by said party of the first part, of the principal and interest of the bonds of the state of Minnesota to be issued to said party of the first part,
228 by said party of the second part, then, in that case, this instrument is to be utterly null and void, and the same shall be cancelled and annulled without any act, or deed to be done, or performed by the party of the first part, or the party of the second part hereto, and the net profits of said road hereby pledged, and any and all, right, title and claim thereto, shall at once, revert to and reinvest in said party of the first part, as fully and as perfectly as if this instrument had never been executed.

In witness whereof, the party of the first part has hereunto and to one other original indenture of the same tenor, in all respects as this, set its corporate seal, and has signed the same by its president and secretary, the day and year first above written.

(Signed) THE MINNESOTA & PACIFIC R. R. CO.,
By EDMUND RICE, *President*.
JAMES W. TAYLOR,
[CORPORATE SEAL.] *Secretary*.

(Duly acknowledged.)

229 DEFENDANT'S EXHIBIT 7.

Conveyance of Two Hundred and Forty Sections of Land by the Minnesota and Pacific Railroad Company to the State of Minnesota.

This Indenture, made this twenty-third day of November, one thousand eight hundred and fifty-eight, at the City of St. Paul, in the State of Minnesota, between the Minnesota and Pacific Railroad Company, a body corporate created by an act of the Legislative Assembly of the late Territory of Minnesota, hereinafter referred to, party of the first part, and the State of Minnesota, party of the second part, witnesseth:

Whereas, by an act of Congress of the United States, approved March 3, one thousand eight hundred and fifty-seven, entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State," there was granted by the United States to the late Territory of Minnesota for the purpose of aiding in the construction of railroads from and to certain points and places mentioned in said act (to which reference is hereby made for a particular description thereof) every alternate section of land, designated by odd numbers for six sections in width on each side of said roads and branches, except in cases

230 where it should appear that the United States had, when the lines or routes of said roads were definitely fixed, sold any of such sections or parts of sections, or that the right of pre-emption had attached to the same, and in such cases it was provided by said act of Congress that there should be granted to said Territory, for the like purposes before mentioned, so much land, nearest to the tiers of sections above specified, in alternate sections or parts of sections, as should be equal to such lands as the United States may have sold, or otherwise appropriated, or to which the rights of pre-emption may have attached, the same to be selected by any agent or agents, to be appointed by the Governor of said Territory or future State of Minnesota, subject to the approval of the Secretary of the Interior, and to be located not further than fifteen miles from the line of said railroads or branches; and it being provided by said act that the lands thereby granted for and on account of said roads and branches, severally, should be exclusively applied in the construction of that road for and on account of which such lands were thereby granted, and should be disposed of only as the work progresses.

And whereas, the Legislative Assembly of the late Territory of Minnesota, by an act approved on the twenty-second day of May, one thousand eight hundred and fifty-seven, entitled "An act to execute the trust created by an act of Congress, entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections, to

aid in the construction of certain railroads in said Territory,
231 and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in

said State, and granting certain lands to railroad companies therein named" did create the party of the first part hereto, a body corporate and politic, by the said name and style above given, and did grant to the party of the first part all the interest and estate then present and prospective, of said Territory, and of the State which should succeed it, in or to any or all of the lands theretofore granted by the government of the United States to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North, at Saint Vincent, near the mouth of the Pembina river, agreeably to the terms of the said act of Congress, together with all and singular the rights, privileges and immunities conferred or intended to be conferred by said act of Congress, for aiding in the construction of said roads;

And whereas, by an act of the Legislature of the State of Minnesota, approved on the ninth day of March, one thousand eight hundred and fifty-eight, entitled "An act proposing an amendment to section ten, article 9 of the Constitution, and providing for the submission of the same to the people," provision was made, in case such pro-
232 posed amendment should be, in the manner and at the time therein specified, ratified by the electors of the State, for the issue and delivery to the party of the first part, of the bonds of the State bearing an interest of seven per cent per annum, payable semi-annually, in the City of New York, as a loan of public credit, to an amount not exceeding twelve hundred and fifty thousand dollars.

And whereas, it was among other things provided by the said last mentioned act, that, as security for the punctual payment and redemption of all bonds so issued and delivered to said party of the first part, and as security for the punctual payment of the interest which should accrue thereon, the Governor of the State should demand and receive from said party of the first part, among other things, a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which said party of the first part, then should or thereafter might be authorized to sell, in trust for the better security of the treasury of the State from loss on said bonds.

And whereas, the said amendment proposed in and by said last mentioned act was, at the time and in the manner in such act prescribed, duly ratified by the electors of the State, and thereupon duly incorporated into the constitution of the said State of Minnesota;

And whereas, the lands described in the lists or schedules hereto annexed (which lists or schedules are marked "A," "B" and "C" and are prefixed respectively, "Township 33 North, range 26 west
233 of principal meridian, within the six mile limits," "Township 118 north, range 36 west of principal meridian"—"Lands selected by the agent of the Governor within the nine mile limits, township 35 north, range 28 west of principal meridian" and are hereby made a part of this indenture) have, by virtue of and in accordance with said acts of Congress and of the Legislative Assembly of the late Territory of Minnesota, been selected by agents designated

by the party of the first part, under the appointment of the Governor of the State of Minnesota, and comprise the first two hundred and forty sections of land which the said party of the first part is or may be authorized to sell:

And whereas, it was declared in and by said act of the Legislature of the State of Minnesota, that said conveyance to said State of said two hundred and forty sections of land should authorize the Governor and Secretary of State to make conveyances of title to all or any of such lands to purchasers agreeing with the party of the first part therefor; provided, that before releasing the interest of the state to such lands, such sale shall be approved by the Governor, but the proceeds of all such sales shall be applied to the payment of interest accruing upon the bonds in case of default of the payment of the same, and as a sinking fund to meet any future default in the payment of interest and the principal thereof when due;

And whereas, it was further provided in said last men-
234 tioned act, that in case the party of the first part shall make default in payment of either the interest or principal of the bonds issued to it by the Governor as aforesaid, then the Governor shall proceed in such manner as shall be prescribed by law, to sell the lands held in trust as above, to-wit: the said two hundred and forty sections of land; provided, that if the party of the first part, before the date of sale, shall pay all interest and principal then due, and all expenses incurred by the State, no sale shall take place.

And whereas, by section four of an act of the Legislature of the State of Minnesota, entitled "An act concerning Land Grant Railroads," approved August 12, 1858, it was provided that in case of a sale of lands to be made under and to provide for the default of the party of the first part as aforesaid, the Governor may advertise and sell the same in such parcels and at such times as shall be deemed most expedient, and all such sales or conveyances shall be made by the Governor and Secretary of State, and shall be absolute conveyances of the title in fee, as far as the same may have been vested in the party of the first part, or in the said State, and without any redemption or right of redemption, in any company, or subsequent creditor, person or persons whomsoever; but no sale of lands shall take place if the defaulting company shall make payment of all principal and interest then due and all expenses incurred by the state prior to the day of sale of such lands; but this provision shall not be so construed as to prevent the Governor and Secretary of
State, until such payment by the party of the first part, from
235 making sales and conveyances of any parcels of lands as aforesaid, without the consent or assistance of the party of the first part, whenever default shall occur by said party of the first part as in such act required for any ensuing payment of interest or principal of the Minnesota State Railroad Bonds issued to it as aforesaid;

Now, therefore, this indenture witnesseth, that the party of the first part, in consideration of the premises, and of the sum of one dollar, in hand paid by the party of the second part, the

receipt of which is hereby acknowledged, and in consideration of the issue and delivery of the bonds aforesaid by the party of the second part to the party of the first part, and in order to secure the punctual payment and redemption of all bonds issued and delivered, or to be issued and delivered, as aforesaid, to said party of the first part, and of the interest which shall accrue thereon from time to time, as the same shall become due and payable according to the tenor and effect thereof, in such manner as to exonerate the treasury of the party of the second part from any advances of money for that purpose, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, forever, all those tracts or parcels of land situate, lying and being in the said State of Minnesota, and particularly described and enumerated in the lists and schedules hereinbefore mentioned and hereto annexed
236 and made a part hereof, marked schedule "A," "B" and "C" and prefixed respectively as follows, to-wit: "Township 33 north, range 26 west of principal meridian, within the six mile limits;" "Township 118 north, range 36 west of principal meridian;" "Lands selected by the agent of the Governor within the nine mile limits, township 35 north, range 28 west of principal meridian," which lands are respectively situated within the sections, townships and ranges mentioned in said lists or schedules, and have been selected in the manner required as aforesaid, and comprise the first two hundred and forty sections of land which the party of the first part, by virtue of said act of Congress, and of the Legislative Assembly of the late Territory of Minnesota, is or may be authorized to sell.

To have and to hold the said above granted premises, with the appurtenances, unto the said party of the first part, on the trust and for the uses and purposes in this indenture set forth; that is to say:

If the interest on the bonds so to be issued as aforesaid by the party of the second part, shall not be punctually paid by the party of the first part when the same shall from time to time fall due, or if the principal of such bonds, or of any thereof, shall not be punctually paid and redeemed by the party of the first part, when the same shall become due and demandable according to the tenor and effect of said bonds, then, and in either case, it shall be lawful for the party of the second part, its authorized officers or agents,
237 to take possession of all and singular the said lands and premises hereby granted and conveyed, or expressed, or intended so to be, and to sell the same, at public sale, at such place as shall be by the Governor of the State deemed most expedient, in the manner hereinafter mentioned, in such parcels and at such times as shall, by the said party of the second part be deemed most expedient, and out of the proceeds of such sale or sales, to pay the amount of principal and interest of said bonds, so then in default.

In case of a sale of lands to be made under and by virtue of this indenture, and to provide for any default as aforesaid, in the pay-

ment of the principal or interest of said bonds, the Governor of the State of Minnesota may advertise and sell said lands in such parcels, and at such times as shall be deemed most expedient, but such advertisement shall be made in at least two daily newspapers, published in the City of New York, and one in the City of St. Paul, for at least sixty days immediately prior to such sale.

All such sales, and all conveyances of such lands, shall be made by the Governor and Secretary of State, without the consent or assistance of the party of the first part, and such conveyances shall be absolute conveyances of the title, in fee, as far as the same may have been vested in any such company, to-wit: in the party of the first part or in the State, and without any redemption or right of redemption in the party of the first part, or in any subsequent creditor, person or persons whomsoever:

238 Provided, however, that if the party of the first part, in default as aforesaid, shall, before the day of such sale, pay all the interest or principal then due on said bonds, and all expenses incurred by the State in consequence of such default, no such sale shall take place.

It is understood and agreed that notwithstanding this indenture, the party of the first part may at any time, or from time to time, agree with any person or persons for the sale to him or them of any of the lands hereby granted or intended so to be, and for making conveyances of title to any such person or persons; and the Governor and secretary of State of Minnesota are hereby authorized to make conveyances of title to all or any of such lands so purchased, to the purchasers, provided, that before releasing the interest of the State to such lands, such sale or sales shall be approved by the Governor; but the proceeds of all such sales shall be applied to the payment of interest accruing upon the said bonds, in case of default of the payment of the same, and as a sinking fund to meet any further default in the payment of interest and the principal thereof when due.

And the said party of the first part hereby covenants and agrees, to and with the party of the second part, that the party of the first part shall and will, at any time or times hereafter, upon the reasonable request of the said party of the second part, or of the Governor of the State, make, do and execute, or cause to be made, done and executed, all and every such further and other lawful and

239 reasonable acts, conveyances and assurances, in the law needful or proper for the better and more effectually vesting and confirming to the party of the second part, upon the trusts herein contained, the premises hereby intended to be granted, to-wit: the first two hundred and forty sections of land which the party of the first part is or may be authorized to sell, by virtue of said acts of Congress, and of the Legislative Assembly of the late Territory of Minnesota, as by the said party of the second part its Governor, or counsel learned in the law, shall be reasonably decided, advised, or required.

And the party of the first part further covenants and agrees to and with the party of the second part that if, upon the final allotment of lands to the party of the first part, by the General Land

Office of the United States, any deficiency shall exist, over and above such portions of the land described in the annexed schedule, as shall be so allotted to it, in order to make up the two hundred and forty sections of land, a conveyance of which, by the aforesaid provisions of the Constitution of the State of Minnesota, is required to be made to the party of the second part, by the party of the first part, as security upon the issue and delivery to it of said State bonds, such deficiency will, on the request of the Governor of the State, be supplied by the conveyance, by the party of the first part, of the requisite quantity of other lands which it may be authorized
240 to sell as aforesaid, to be selected under the direction of the Governor, and subject to his approval.

And the party of the first part further covenants and agrees to and with the party of the second part that if, upon the final allotment of lands to the party of the first part, by the General Land Office of the United States, the said lands specified in the schedule hereunto attached, or any portion of them, shall not be assigned to the said party of the first part, then the said party of the first part will, upon the request of the Governor of Minnesota, execute and deliver to the said party of the second part, a good and sufficient conveyance of such other lands as may be so allotted to it, and which it may be authorized to sell as aforesaid, of equal and average quality and value, not exceeding two hundred and forty sections (entire, not fractional) to be selected under the direction of the Governor, and subject to his approval, so that in any case the full amount of two hundred and forty entire sections of said lands shall be secured to the said party of the second part, by the said party of the first part, in and by the terms of this conveyance, to be selected as hereinbefore mentioned.

It is further herein provided, that when the principal and interest of the bonds for securing the payment and redemption of which this indenture is made, shall be fully paid and redeemed, the trust hereby created shall cease and determine, and all the lands, moneys and property then claimed or held by the party of the second part, which shall have been received by and become vested in it
241 under and by virtue of this indenture, shall at once revert to and reinvest in said party of the first part, its successors or assigns, as fully and completely as if this indenture had never been executed.

In witness whereof, the party of the first part hath hereunto, and to one other original indenture of like tenor in all respects with this, caused to be affixed its corporate seal, and hath signed the same by its president and secretary, the day and year first above written.

THE MINNESOTA AND PACIFIC RAILROAD COMPANY.
By R. R. NELSON, *Acting President.*

(Seal of the Company.)

JAMES W. TAYLOR,
Secretary of Minnesota and Pacific R. R. Co.

(Duly acknowledged.)

DEFENDANT'S EXHIBIT 8.

This Indenture, made this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and fifty-eight, between the Minnesota and Pacific Railroad Company, party of the first part, and Elon Farnsworth of the state of Michigan, Edward P. Cowles, of the city of New York and William H. Welch, of the state of Minnesota, parties of the second part, trustees, as hereinafter mentioned, witnesseth.

242 Whereas, the said party of the first part has executed to the parties of the second part trustees as aforesaid a trust deed bearing date the thirty-first day of July, one thousand eight hundred and fifty-eight, as security for the payment of the principal and interest upon the bonds of the party of the first part as in said trust deed mentioned and specified.

And Whereas a portion of the bonds of the said The Minnesota and Pacific Rail Road Company, which are secured by said trust deed are to be delivered to the State of Minnesota, corresponding to an amount of the bonds of said state which shall or may be issued and delivered to said company.

And Whereas the said trustees in and by said trust deed are authorized and empowered in case of default in the payment of the interest or principal of said bonds as therein mentioned to make sale of all or any of the property conveyed and transferred to them, or expressed or intended so to be, in and by said trust deed in the manner therein specified.

And Whereas it is intended and desired that punctual payment of the interest and principal on the bonds to be delivered and held by the state as aforesaid shall be secured and as a supplement to and as a part of said trust deed the said trustees therein mentioned or the survivor or survivors of his or their successors in the trust thereby created are hereby authorized and directed in case of a default in the payment of such interest and principal, upon the demand and

243 request of the governor of said state, as the agent of said state to foreclose such trust deed, and to take possession of all and singular the said premises conveyed and transferred or expressed or intended so to be in and by said trust deed, and shall upon such demand and request sell such premises and property or so much thereof as the said governor may direct pursuant to the terms and provisions of said trust deed; except that in case of such foreclosure and sale pursuant to such demand and request as aforesaid, such sale shall be made within sixty days after such default as aforesaid shall be made, and public notice of such sale shall be given by advertisement in one daily newspaper printed and published in the city of New York, and in one daily newspaper printed and published in the city of Saint Paul for six weeks successively. And in case of the failure or refusal of the said trustees or the survivor or survivors of them or their successors to comply with such demand and request of the said governor to make such foreclosure and sale as aforesaid, then the said governor of the state, as the agent of the said state is hereby authorized

and empowered to make or cause to be made such foreclosure and sale as aforesaid so that said foreclosure and sale shall be made within sixty days after the occurrence of any default as aforesaid on the part of the said company, anything in the trust deed or in this deed which is supplementary thereto, to the contrary notwithstanding and in case of the said foreclosure and sale as aforesaid by the governor of the state as the agent of the said state, the said governor of
244 the state is hereby authorized and empowered for and in the name of the said Minnesota and Pacific Rail Road Company to make or cause to be made good and sufficient deeds of conveyance or other necessary instruments of transfer of the roads, lands, franchises and other property of the said company or any part thereof as may be foreclosed and sold as aforesaid which said deeds of conveyance or other necessary instruments of transfer as aforesaid shall include and embrace all the rights, interest, ownership, claim and demand of the said company party of the first part, and of the said parties of the second part in and to the said premises sold as aforesaid in law and equity.

In case of a foreclosure and sale as herein mentioned, whether by the said trustees or the said governor the proceeds arising from such sale shall be applied to the payment of the amount due on the bonds secured by said trust deed as therein provided; but if such foreclosure and sale shall be made by the governor as aforesaid, all damages, costs, charges and expenses which said sale has sustained or incurred by reason of the default aforesaid shall be paid out of such proceeds; and in case of a foreclosure and sale by the trustees as herein provided, the costs and expenses of the same are to be paid by the said party of the first part and not by the state.

It is expressly understood and declared that the proviso contained in said trust deed "that if a majority in interest of said bondholders shall deem such sale unadvisable, or the time named for it
245 unfavorable to the interests of said bondholders, and if they shall in writing request the trustees to delay such sale, such trustees shall postpone the same to such time not exceeding twelve months as may be named in said writing" shall be inapplicable and inoperative and of no force or effect, in case a foreclosure and sale shall be made by said trustees, or by said governor, as herein mentioned; and all parts and provisions of said trust deed, and particularly those contained in the fourth term condition or provision on page eleven of said trust deed which are inconsistent or in conflict with this instrument in respect to the foreclosure and sale, whether by the said trustees, or by said governor and the time and manner of such foreclosure and sale as herein provided, are hereby declared to be inoperative and of no force or effect; it being the intent and design of this instrument in the provisions in respect to the foreclosure and sale herein mentioned to provide for and secure the punctual payment of the amount due on the bonds in said trust deed and herein mentioned, and for this purpose this indenture is executed as a part of and as a supplement to said trust deed.

In witness whereof the parties to these presents have hereunto at the City of St. Paul in the State of Minnesota and to three other

original indentures of the same tenor in all respects as this interchangeably set their seals (the party of the first part its corporate seal) and have signed the same, the party of the first part by its president and secretary, the day and year first above written.

246

THE MINNESOTA & PACIFIC RAILROAD COMPANY,
By EDMUND RICE, *President.*

[Corporate Seal.]

JAMES W. TAYLOR,
Secretary M. & P. R. R. Co.
ELON FARNSWORTH. [SEAL.]
EDWARD P. COWLES. [SEAL.]
WILLIAM H. WELCH. [SEAL.]

(Duly acknowledged.)

DEFENDANT'S EXHIBIT 9.

Foreclosure Sale of the Lands, Properties, and Franchises of the Minnesota and Pacific Railroad Company.

Whereas, the Minnesota and Pacific Railroad Company, a corporation organized under the laws of the state of Minnesota, did, on the 31st day of July, A. D. 1858, at the city of New York and state of New York, execute under its corporate seal, and deliver to Elon Farnsworth, Edward P. Cowles and William H. Welch, in trust for the holders of the first mortgage bonds to be issued by the said company, a certain indenture and trust deed, whereby the said Minnesota and Pacific Railroad Company, transferred, conveyed and assigned unto said Elon Farnsworth, Edward P. Cowles and William H. Welch as joint tenants and not as tenants in common, and to their survivors and successors in the trust therein expressed, the entire railroad of said company from Stillwater, in the state of Minnesota via St. Paul, and St. Anthony via Minneapolis to the town of Breckenridge, on the Sioux Wood River, with a branch from St. Anthony, via Anoka and St. Cloud and Crow Wing to St. Vincent, near the mouth of the Pembina River; also, all the railways, rails, bridges, fences, ties, spikes, culverts, right of way, station houses, and other buildings, and such lands as are selected or actually in use for depot or station grounds, then held or owned, or which might thereafter be held or owned by said company for the purpose of constructing, operating and maintaining its said railroad, or the accommodation of the business thereof and all the tolls, incomes, rents, issues, profits and alienable franchises of said company connected with said railroad or relating thereto, all locomotives and stationary engines, tenders, and cars of every kind, machinery, machine shops, tools, implements and materials connected with or intended for the construction, equipment, operating and conducting of said railroad and branch then owned or thereafter to be acquired by said company, all

247

of which were in said deed declared to be appurtenances and fixtures of said road for the purpose of securing the payment of the first mortgage bonds of said company from time to time to be issued to the aggregate amount of twenty-three millions of dollars, but not
248 exceeding thirty-five thousand dollars for each mile of road; said first mortgage bonds to be payable to the holders thereof on the first day of August, A. D. 1883, with interest, at the rate of 7 per cent. per annum, payable in the city of New York semi-annually, on the first days of February and August in each year; and whereas, six hundred of said first mortgage bonds in denominations of one thousand dollars each were delivered to and are held by the state of Minnesota, as security for the payment of the principal and interest of an equal amount of the bonds of the state of Minnesota issued and delivered to said company payable at the same time, with interest at the rate of seven per cent. per annum, payable semi-annually on the 1st days of December and June in each and every year.

And whereas, the said Minnesota and Pacific Railroad Company, on the twenty-seventh day of November, A. D. 1858, executed under their corporate seal and delivered to said Elon Farnsworth, Edward P. Cowles and William H. Welch, in trust for said first mortgage bondholders, a supplement to said trust deed, wherein it was recited that whereas, a portion of the bonds of said company were to be delivered to the state of Minnesota, and whereas, the said trustees were authorized and empowered by said trust deed, in case of default in the payment of the principal or interest of said first mortgage bonds therein mentioned, to make sale of all or any of the property therein conveyed, in the manner therein specified; and whereas in and by said supplement the said trustees, their survivors
249 or successors in the trust thereby created, were authorized and directed in case of a default in the payment of the interest or principal of said first mortgage bonds upon the demand and request of the governor of the state of Minnesota as the agent of said state to foreclose such trust deed and take possession of all and singular the premises conveyed and transferred by said trust deed, and upon such demand and request to sell such premises and property, or so much thereof as the said governor might direct; pursuant to the terms and provisions of said trust deed, by giving public notice of such sale by advertisement in one daily newspaper printed and published in the city of New York, and in one daily newspaper printed and published in the city of St. Paul for six weeks successively, and in case of failure or refusal of said trustees, or the survivor or survivors of them, to comply with the demand and request of the said Governor to make such foreclosure and sale as aforesaid, then the governor of said state was thereby authorized and empowered to make, or cause to be made, such foreclosure and sale as aforesaid, and in case of such foreclosure and sale by the governor, he was thereby authorized and empowered for and in the name of the said Minnesota and Pacific Railroad Company, to make, or cause to be made, good and sufficient deeds or conveyance or other necessary instruments of transfer of the roads, lands, franchises and other

property of said company; and whereas, the interest on the
250 said bonds of said state issued to said companies became payable on the first day of December, A. D. 1859, and the said company having made default in the payment thereof, the governor of said state did on the fifth of December aforesaid, as required by law, demand and request each of said trustees, in writing, to foreclose said trust deed and to sell the property and franchises therein conveyed, pursuant to the terms of said trust deed; and whereas, said Minnesota and Pacific Railroad Company have made default in the payment of the interest accruing upon such first mortgage bonds held by said state, and becoming payable on the first day of August, A. D. 1859, and whereas, the sum of twenty-one thousand dollars is still due to said state and unpaid thereon, and whereas, said trustees have utterly neglected, and still do neglect, to proceed to the foreclosure of said trust deed and the sale of the property and franchises therein conveyed.

Now, therefore, notice is hereby given, that pursuant to the power vested in me, in and by said trust deed and the supplement thereto, and by virtue of the power conferred upon me by law, I, as governor and agent of said state of Minnesota, will sell, or cause to be sold, at public auction at the capitol, in the city of St. Paul in the state of Minnesota, on the 23rd day of June next, at ten o'clock in the forenoon of that day, all the properties, rights, privileges and franchises, hereinbefore enumerated, and described and conveyed in and by said trust deed.

251 Dated at the Executive Office in Saint Paul, the twenty-fourth day of April, A. D. 1860.

ALEX RAMSEY, *Governor.*
GORDON E. COLE,
Att'y Gen'l of Minnesota.

STATE OF MINNESOTA,
County of Ramsey, ss:

B. W. Brunson, of the county aforesaid being duly sworn deposes and says that he is an auctioneer duly licensed pursuant to law within and for the said county of Ramsey, that on the twenty-third day of June, A. D. 1860, between the hours of ten and eleven o'clock in the forenoon of that day, he did pursuant to the annexed notice and by the direction of the governor of the state of Minnesota, sell at public auction at the capitol in the city of St. Paul in said county of Ramsey all the railroad of the Minnesota and Pacific Railroad Company, and all the properties, lands, franchises, rights and privileges of said company conveyed and enumerated in the trust deed described in the notice annexed for a more accurate and detailed statement of which reference to said notice may be had, together with all the right, title and interest which the said Minnesota and Pacific Railroad Company had on the thirty-first day of July, A. D. 1858, or which they have since that time or may hereafter acquire or become entitled to in and to all those sections or parts of sections granted to the late territory of Minnesota by the act
252 of Congress of the United States of America approved on the third day of March, A. D. 1857, and which were subsequently

granted to the said Minnesota and Pacific Railroad Company by an act of the legislature of the late territory of Minnesota, approved on the 22nd day of May, A. D. 1857, for a further and more particular description of which reference is made to the trust deed of the said Minnesota and Pacific Railroad Company on file in the office of the secretary of state of the state of Minnesota, to the state of Minnesota for the sum of one thousand dollars, that being the highest price bid for the same, and the state of Minnesota aforesaid being the highest bidder therefor.

B. W. BRUNSON, *Auctioneer.*

Subscribed and sworn to before me this twenty-third day of June, A. D. 1860.

[NOTARIAL SEAL.]

S. S. EATON,
Notary Public, Minn.

Filed June 23, 1860.

J. H. BAKER,
Sec. of State.

Foreclosure Sale of the Lands, Properties and Franchises of the Minnesota and Pacific Railroad Company.

Whereas, the Minnesota and Pacific Railroad Company, a corporation organized under the laws of the state of Minnesota,
253 did, on the 31st day of July, A. D. 1858, at the city of New York and state of New York, execute under its corporate seal, and deliver to Elon Farnsworth, Edward P. Cowles and William H. Welch, in trust for the holders of the first mortgage bonds to be issued by the said company, a certain indenture and trust deed, whereby the said Minnesota and Pacific Railroad Company granted, transferred, conveyed and assigned unto said Elon Farnsworth, Edward P. Cowles and William H. Welch as joint tenants and not as tenants in common, and to their survivors and successors in the trust therein expressed, the entire railroad of said company from Stillwater, in the state of Minnesota via St. Paul, and St. Anthony via Minneapolis to the town of Breckenridge, on the Sioux Wood River, with a branch from St. Anthony, via Anoka and St. Cloud and Crow Wing to St. Vincent, near the mouth of the Pembina River; also, all the railways, rails, bridges, fences, ties, spikes, culverts, right of way, station houses, and other buildings, and such lands as are selected or actually in use for depot or station grounds, then held or owned, or which might thereafter be held or owned by said company for the purpose of constructing, operating and maintaining its said railroad, or the accommodation of the business thereof and all the tolls, incomes, rents, issues, profits and alienable franchises of said company connected with said railroad or relating thereto, all locomotives and stationary engines, tenders, and cars of every
kind, machinery, machine shops, tools, implements and mate-
254 rials connected with or intended for the construction, equipment, operating and conducting of said railroad and branch then owned or thereafter to be acquired by said company, all of

which were in said deed declared to be appurtenances and fixtures of said road for the purpose of securing the payment of the first mortgage bonds of said company from time to time to be issued to the aggregate amount of twenty-three millions of dollars, but not exceeding thirty-five thousand dollars for each mile of road; said first mortgage bonds to be payable to the holders thereof on the first day of August, A. D. 1883, with interest, at the rate of 7 per cent. per annum, payable in the city of New York semi-annually, on the first days of February and August in each year; and whereas, six hundred of said first mortgage bonds in denominations of one thousand dollars each, were delivered to and are held by the state of Minnesota, as security for the payment of the principal and interest of an equal amount of the bonds of the state of Minnesota issued and delivered to said company payable at the same time, with interest at the rate of seven per cent. per annum, payable semi-annually on the 1st days of December and June in each and every year.

And whereas, the said Minnesota and Pacific Railroad Company, on the twenty-seventh day of November, A. D. 1858, executed under their corporate seal and delivered to said Elon Farnsworth, Edward P. Cowles and William H. Welch in trust for said first mortgage bondholders, a supplement to said trust deed, wherein it was
255 recited that whereas, a portion of the bonds of said company were to be delivered to the state of Minnesota, and whereas, the said trustees were authorized and empowered by said trust deed, in case of default in the payment of the principal or interest of said first mortgage bonds therein mentioned, to make sale of all or any of the property therein conveyed, in the manner therein specified; and whereas in and by said supplement the said trustees, their survivors or successors in the trust thereby created, were authorized and directed in case of a default in the payment of the interest or principal of said first mortgage bonds upon the demand and request of the governor of the state of Minnesota as the agent of said state to foreclose such trust deed and take possession of all and singular the premises conveyed and transferred by said trust deed, and upon such demand and request to sell such premises and property, or so much thereof as the said governor might direct; pursuant to the terms and provisions of said trust deed, by giving public notice of such sale by advertisement in one daily newspaper printed and published in the city of New York, and in one daily newspaper printed and published in the city of St. Paul, for six weeks successively, and in case of failure or refusal of said trustees, or the survivor or survivors of them, to comply with the demand and request of the said governor to make such foreclosure and sale as aforesaid, then the governor of said state was thereby authorized and empowered to make, or cause to be made, such foreclosure and
256 sale as aforesaid, and in case of such foreclosure and sale by the governor he was thereby authorized and empowered for and in the name of the said Minnesota and Pacific Railroad Company to make, or cause to be made, good and sufficient deeds of conveyance or other necessary instruments of transfer of the roads, lands, franchises and other property of said company; and whereas

the interest on the said bonds of said state issued to said companies became payable on the first day of December, A. D. 1859, and the said company having made default in the payment thereof the governor of said state did on the fifth of December aforesaid, as required by law, demand and request each of said trustees, in writing, to foreclose said trust deed, and to sell the property and franchises therein conveyed, pursuant to the terms of said trust deed; and whereas, said Minnesota and Pacific Railroad Company have made default in the payment of the interest accruing upon such first mortgage bonds held by said state, and becoming payable on the first day of August, A. D. 1859, and whereas, the sum of twenty-one thousand dollars is still due to said state and unpaid thereon, and whereas, said trustees have utterly neglected, and still do neglect, to proceed to the foreclosure of said trust deed and the sale of the property and franchises therein conveyed;

Now, therefore, notice is hereby given that pursuant to the power vested in me in and by said trust deed, and the supplement thereto, and by virtue of the power conferred upon me by law, I, as governor and agent of said state of Minnesota, will sell, or cause
257 to be sold, at public auction at the capitol, in the city of St. Paul, in the state of Minnesota, on the 23rd day of June next, at ten o'clock in the forenoon of that day, all the properties, rights, privileges and franchises hereinbefore enumerated and described, and conveyed in and by said trust deed.

Dated at the Executive Office, in Saint Paul, the twenty-fourth day of April, A. D. 1860.

ALEX. RAMSEY, *Governor.*

GORDON E. COLE,
Att'y Gen'l of Minnesota.

(Duly verified.)

Foreclosure Sale of the Lands, Properties and Franchises of the Minnesota and Pacific Railroad Company.

Whereas the Minnesota and Pacific Railroad Company, a corporation organized under the laws of the state of Minnesota, did, on the 31st day of July, A. D. 1858, at the city of New York and state of New York, execute under its corporate seal and deliver to Elon Farnsworth, Edward P. Cowles and William H. Welch, in trust for the holders of the first mortgage bonds to be issued by the said company, a certain indenture and trust deed, whereby the said Minnesota and Pacific Railroad Company granted, transferred, conveyed and assigned unto said Elon Farnsworth, Edward P.
258 Cowles and William H. Welch, as joint tenants, and not as tenants in common, and to their survivors and successors in the trust therein expressed, the entire railroad of said company from Stillwater, in the state of Minnesota via St. Paul, and St. Anthony via Minneapolis, to the town of Breckenridge, on the Sioux Wood river, with a branch from St. Anthony, via Anoka and St. Cloud and

Crow Wing, to St. Vincent, near the mouth of the Pembina river; also, all the railways, rails, bridges, fences, ties, spikes, culverts, right of way, station houses and other buildings, and such lands as are selected or actually in use for depot or station grounds then held or owned, or which might thereafter be held or owned, by said company for the purpose of constructing, operating and maintaining its said railroad, or the accommodation of the business thereof, and all the tolls, incomes, rents, issues, profits and alienable franchises of said company connected with said railroad or relating thereto, all locomotives and stationary engines, tenders and cars of every kind, machinery, machine shops, tools, implements and materials connected with or intended for the construction, equipment, operating and conducting of said railroad and branch then owned or thereafter to be acquired by said company, all of which were in said deed declared to be appurtenances and fixtures of said road for the purpose of securing the payment of the first mortgage bonds of said company from time to time to be issued to the aggregate amount of twenty-three millions of dollars, but not exceeding thirty-
259 five thousand dollars for each mile of road; said first mortgage bonds to be payable to the holders thereof on the first day of August, A. D. 1885, with interest at the rate of 7 per cent. per annum, payable in the city of New York semi-annually on the first days of February and August in each year; and whereas, six hundred of said first mortgage bonds, in denominations of one thousand dollars each, were delivered to and are held by the state of Minnesota as security for the payment of the principal and interest of an equal amount of the bonds of the state of Minnesota issued and delivered to said company payable at the same time, with interest at the date of 7 per cent. per annum, payable semi-annually on the 1st days of December and June in each and every year.

And whereas, the said Minnesota and Pacific Railroad Company, on the twenty-seventh day of November, A. D. 1858, executed under their corporate seal and delivered to said Elon Farnsworth, Edward P. Cowles and William H. Welch, in trust for said first mortgage bondholders, a supplement to said trust deed, wherein it was recited that, whereas, a portion of the bonds of said company were to be delivered to the state of Minnesota, and whereas, the said trustees were authorized and empowered by said trust deed, in case of default in the payment of the principal or interest of said first mortgage bonds therein mentioned, to make sale of all or any of the property therein conveyed, in the manner therein specified; and, whereas, in and by said supplement the said trustees, their survivors or
260 successors in the trust thereby created, were authorized and directed in case of a default in the payment of the interest or principal of said first mortgage bonds upon the demand and request of the governor of the state of Minnesota, as the agent and of said state to foreclose such trust deed and take possession of all and singular the premises conveyed and transferred by said trust deed, and upon such demand and request to sell such premises and property, or so much thereof as the said governor might direct; pursuant to the terms and provisions of said trust deed, by giving public

notice of such sale by advertisement in one daily newspaper printed and published in the city of New York, and in one daily newspaper printed and published in the city of St. Paul, for six weeks successively, and in case of failure or refusal of said trustees, or the survivor or survivors of them, to comply with the demand and request of the said governor to make such foreclosure and sale as aforesaid, then the governor of said state was thereby authorized and empowered to make, or cause to be made, such foreclosure and sale as aforesaid, and in case of such foreclosure and sale by the governor he was thereby authorized and empowered for and in the name of the said Minnesota and Pacific Railroad Company, to make, or cause to be made, good and sufficient deeds or conveyance or other necessary instruments of transfer of the roads, lands, franchises and other property of said company; and whereas, the interest on the said bonds of said state issued to said companies became payable
261 on the first day of December, A. D. 1859, and the said company having made default in the payment thereof, the governor of said state did, on the fifth of December aforesaid, as required by law, demand and request each of said trustees, in writing, to foreclose said trust deed and to sell the property and franchises therein conveyed, pursuant to the terms of said trust deed; and whereas, said Minnesota and Pacific Railroad Company have made default in the payment of the interest accruing upon such first mortgage bonds held by said state, and becoming payable on the first day of August, A. D. 1859, and whereas, the sum of twenty-one thousand dollars is still due to said state and unpaid thereon, and whereas, said trustees have utterly neglected, and still do neglect, to proceed to the foreclosure of said trust deed and the sale of the property and franchises therein conveyed:

Now, therefore, notice is hereby given that pursuant to the power vested in me in and by said trust deed, and the supplement thereto, and by virtue of the power conferred upon me by law, I, as governor and agent of said state of Minnesota, will sell, or cause to be sold, at public auction, at the capitol, in the city of St. Paul, in the state of Minnesota, on the 23rd day of June next, at ten o'clock in the forenoon of that day, all the properties, rights, privileges and franchises hereinbefore enumerated, and described, and conveyed in and by said trust deed.

Dated at the Executive Office, in Saint Paul, the twenty-
262 fourth day of April, A. D. 1860.

ALEX. RAMSEY, *Governor.*

GORDON E. COLE,
Att'y Gen'l of Minnesota.

(Duly verified.)

STATE OF MINNESOTA,
EXECUTIVE OFFICE, ST. PAUL *June 23rd*, 1860.

I, Alexander Ramsey, Governor of Minnesota, do hereby certify that on the twenty-third day of June, A. D. 1860, between the hours of ten and eleven o'clock in the forenoon of that day, at the capitol

in the city of Saint Paul, county of Ramsey and state aforesaid pursuant to law and to the notice hereto annexed, I did, as Governor of said state of Minnesota, cause all the rights, lands, properties, privileges and franchises which the Minnesota and Pacific Railroad Company owned on the thirty-first day of July, A. D. 1858, together with all the right, title and interest of said railroad company which they then had, or have since acquired, or may hereafter acquire in and to all those sections or parts of sections granted to the late territory of Minnesota by an act of the congress of the United States, approved on the third day of March, A. D. 1857, and subsequently granted to said Minnesota and Pacific Railroad Company by an act of the legislative assembly of the late territory of Minnesota, approved on the twenty-second day of May, A. D. 1857,
263 for a full and detailed account of all of which property reference may be had to the trust deed of said Minnesota and Pacific Railroad Company on file in the office of the secretary of state of the state of Minnesota, to be sold at public auction by B. W. Brunson, Esq., whose affidavit is hereto annexed, and did by virtue of the power vested in me by law, bid for and on behalf of said state the sum of one thousand dollars for all of the lands, rights, properties and franchises conveyed by the trust deed of said company, hereinbefore mentioned, that sum being the highest bid the said properties, lands, rights and franchises were struck off to, and were purchased by the state of Minnesota.

And I do further certify that prior to said sale I caused a notice of the time, and place, and manner of such sale to be published daily for six consecutive weeks in one daily newspaper published in the city of New York, and in one daily newspaper published in the city of St. Paul, a copy of which notice is hereto annexed, all of which will more fully appear by the affidavits of the printers of the respective papers in which the same was published, which are hereto annexed.

ALEX. RAMSEY.

D 17. Filed June 23, 1860.

J. H. BAKER,
Sec. of State.

(Duly certified by the Secretary of State of Minnesota.)

264 DEFENDANT'S EXHIBIT 10.

This Indenture, made the sixteenth day of October, in the year of our Lord one thousand eight hundred and sixty, between the Minnesota and Pacific Railroad Company, a corporation created by an act of the Legislative Assembly of the late territory of Minnesota, party of the first part, and the state of Minnesota, party of the second part, witnesseth, that whereas said party of the first part did on the thirty-first day of July, A. D. 1858, at the city of New York, and state of New York, execute under its corporate seal and deliver

unto Elon Farnsworth, Edward P. Cowles and William H. Welch, in trust for the holders of the first mortgage bonds to be issued by said party of the first part, a certain indenture and trust deed whereby the said party of the first part granted, transferred, conveyed and assigned unto said Elon Farnsworth, Edward P. Cowles and William H. Welch, as joint tenants, and not as tenants in common, and to their survivors and successors in the trust therein expressed, the entire railroad of said party of the first part from Stillwater, in the state of Minnesota via St. Paul, and St. Anthony via Minneapolis to the town of Breckenridge, on the Sioux Wood river, with a branch from St. Anthony via Anoka and St. Cloud and Crow Wing to St. Vincent, near the mouth of the Pembina river, also all the railways, rails, bridges, fences, ties, spikes, culverts, rights of way, station houses and other buildings, and such lands as
265 are selected or actually in use for depot or station grounds then held or owned, or which might thereafter be held or owned by said party of the first part for the purpose of constructing, operating and maintaining its said railroad or the accommodation of the business thereof, and all the tolls, incomes, rents, issues, profits and alienable franchises of said party of the first part connected with said railroad or relating thereto, all locomotives and stationary engines, tenders and cars of every kind, machinery, machine shops, tools, implements and materials connected with or intended for the construction, equipment, operating and conducting of said railroad and branch then owned or thereafter to be acquired by said party of the first part all of which were in said deed declared to be appurtenances and fixtures of said railroad. Together with all the right, title and interest which said party of the first part then had or might thereafter acquire or become entitled to in or to all those sections or parts of sections of land granted to the late territory of Minnesota by act of Congress approved on the third day of March, A. D. 1857, for the purpose of aiding in the construction of a railroad from Stillwater by way of St. Paul and St. Anthony via Minneapolis to a point between the foot of Big Stone lake and the mouth of the Sioux Wood river, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North at such point as the legislature of said territory might determine, and which were subsequently granted to said party of the first part by
266 an act of the late territory of Minnesota, approved on the twenty-second day of May, A. D. 1857, for a more full and accurate description of all of which property reference may be had to the trust deed of said party of the first part on file in the office of the secretary of state of the state of Minnesota, for the purpose of securing the payment of the first mortgage bonds of said company from time to time to be issued to the amount of twenty-three millions of dollars, but not exceeding thirty-five thousand dollars for each mile of road. Said first mortgage bonds to be paid to the holders thereof on the first day of August, A. D. 1883, with interest at the rate of seven per cent. per annum payable semi-annually in the city of New York on the first days of February and August in each and every year, and whereas, six hundred of said first mortgage

bonds in denominations of one thousand dollars each were delivered to and are held by the state of Minnesota as security for the payment of an equal amount of bonds of the state of Minnesota issued and delivered to said company payable at the same time, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of December and June of each and every year. And whereas, the said party of the first part, on the twenty-seventh day of November, A. D. 1858, executed under its corporate seal and delivered to said Elon Farnsworth, Edward P. Cowles and William H. Welch, in trust for said first mortgage bondholders a supplement to said trust deed wherein it was recited that whereas a portion of the bonds of said company were to be delivered to the state of
267 Minnesota, and whereas, the said trustees were authorized and empowered by said trust deed in case of default in the payment of the principal or interest of said first mortgage to make sale of all or any of the property therein conveyed, in the manner therein specified. And whereas, in and by said supplement the said trustees, their survivors or successors in the trust thereby created were authorized and directed in case of default in the payment of the interest or principal of said first mortgage bonds upon demand and request of the governor of the state of Minnesota as the agent of said state to foreclose said trust deed and take possession of all and singular the premises conveyed and transferred by said trust deed and upon such demand and request to sell such premises and property, or so much thereof as the said governor might direct, pursuant to the terms and provisions of said trust deed by giving public notice of such sale by advertisement in one daily newspaper printed and published in the city of New York, and in one daily newspaper printed and published in the city of St. Paul for six weeks successively, and in case of the failure or refusal of said trustees, or the survivors or survivor of them, to comply with the demand and request of the said Governor to make such foreclosure and sale as aforesaid, then the governor of said state was thereby authorized and empowered to make or cause to be made such foreclosure and sale in the manner aforesaid, and in case of foreclosure and sale by the governor he was thereby authorized and empowered for and
268 in the name of the said Minnesota and Pacific Railroad Company to make or cause to be made good and sufficient deeds of conveyance or other necessary instruments of transfer of the roads, lands, franchises and other property of said company including and embracing all the right and interest of said company in said premises, in law and equity, and whereas, the interest on the bonds of said state issued to said company became due and payable on the first day of December, A. D. 1859, and the said company having made default in the payment thereof the governor of said state did, on the fifth day of December aforesaid, as required by law, demand and request to each of said trustees to foreclose said trust deed and to sell the property and franchises therein conveyed pursuant to the terms of said trust deed the said Minnesota and Pacific Railroad Company having also made default in the payment of the interest

accruing upon its first mortgage bonds held by said state and becoming due and payable on the first day of August, A. D. 1859. And whereas, the sum of twenty-one thousand dollars became thereby due upon said first mortgage bonds, and whereas said trustees utterly neglected and refused to proceed to foreclose said trust deed and sell the property and franchises therein conveyed. And whereas, by an act of the legislature of the state of Minnesota, approved the sixth day of March, A. D. 1860, the governor of said state was authorized to foreclose said trust deed, and, upon the sale of the property rights and franchises covered and embraced in said deed, to bid off
269 and purchase the same for and in the name of said state, and to make or cause to be made such suitable and proper conveyances as may be necessary. And whereas, pursuant to the provisions of said trust deed, and as directed by law, the governor of said state did upon default of said trustees as aforesaid, after a public notice published as directed in said trust deed, cause said trust deed to be foreclosed. And as governor and agent of said state of Minnesota cause all the properties, rights, privileges and franchises belonging to said company and conveyed in and by said trust deed to be sold at public auction at the capitol, in the city of St. Paul, and state of Minnesota, between the hours of ten and eleven o'clock in the forenoon of the twenty-third day of June, A. D. 1860, and whereas, pursuant to the power vested in him by law, said governor did bid off and purchase said lands, roads and franchises for and in the name of the state of Minnesota for the sum of one thousand dollars, said state being the highest bidder, and that being the highest price bidden therefor.

Now, therefore, this indenture witnesseth, that the said party of the first part in consideration of the premises and of the sum of one thousand dollars paid by the party of the second part, the receipt whereof is hereby acknowledged, hath granted, conveyed, bargained, sold, transferred and assigned, and by these presents does grant, convey, bargain, sell, transfer and assign unto the party of the
270 second part and its assigns, all the rights, lands, properties, privileges and franchises described, enumerated and conveyed in the trust deed of said Minnesota and Pacific Railroad Company and hereinbefore described, for a more particular description of which reference is made to the trust deed of said company on file in the office of the secretary of state of the state of Minnesota, together with all right and equity of redemption of said company in and to any of said property either real or personal. To have and to hold to said party of the second part and its assigns forever.

In witness whereof said party of the first part has set its seal and subscribed its name by Alexander Ramsey, governor of Minnesota, its attorney in fact by virtue of the authority vested in him in and by the supplement to said trust deed hereinbefore referred to the day and year first above written.

THE MINNESOTA & PACIFIC RAILROAD COMPANY,

By ALEX. RAMSEY, [SEAL.]

Its Attorney in Fact.

Executed and delivered in the presence of—three words interlined before signing—
C. E. COLE.
S. P. JENNISON.

(Duly acknowledged.)
(Duly certified by the Secretary of State of Minnesota.)

271 DEFENDANT'S EXHIBIT 11.

An Act to Facilitate the Construction of the Minnesota and Pacific Railroad.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That the road, lands, property, rights, franchises, privileges and immunities belonging or pertaining to the Minnesota and Pacific Railroad Company, prior to the sale and purchase thereof by the Governor on the 23rd day of June, 1860, on behalf of the state, and now claimed or held by the state, and all bonds and securities of the said company held by the state, shall be and are hereby released, discharged and restored to the said company free of all liens or claims thereon held by or in behalf of the state.

SEC. 2. The provisions in this act contained are upon condition that said company shall commence the construction of that portion of said road and branch extending from Saint Paul to St. Cloud and Sauk Rapids, on or before the first day of July next, and to put the same into operation fully equipped for business within eighteen months thereafter, and to construct and put in operation and fully equip for business those portions of the main line of said road, extending from St. Anthony, via Minneapolis, westwardly to the west line of range thirty, and from Stillwater to St. Paul within fifteen months from the expiration of the time last aforesaid, and
272 thereafter to continue to construct and put in operation and fully equip for business the said road or branch at the rate of thirty miles annually; and all of said road and branch on or before the 3rd day of March, 1870.

SEC. 3. That said company shall, as a further consideration of this act, construct and put into operation and fully equip for business that portion of the main line extending from Saint Paul to Saint Anthony, on or before the first day of January next, in default of which all the rights and benefits conferred upon said company by virtue of this act shall be forfeited to the state absolutely, and without any further act or ceremony whatever; and in case the said company shall fail to construct the other and further portions of said road and branch as aforesaid, at the time or times aforesaid, the said company shall forfeit to the state absolutely, and without any further act or ceremony whatever, all the lands, property and franchises pertaining to the unbuilt portions of said road and branch, and in either case, or in any forfeiture whatever under the provisions of this act, the state shall hold and be possessed of all such lands, property and

franchises so forfeited without merger or extinguishment, to be used, granted or disposed of for the purpose of aiding and facilitating the construction of said road and branch.

SEC. 4. And be it further enacted, that as a condition precedent to the right of said company to the rights, privileges, franchises, road-beds, right of way, properties and immunities thereinbefore
273 granted and assigned or restored, and before any right or title whatever thereto shall vest in said company said company shall pay to the state treasurer the amount of legal costs and expenses incurred by the state in the foreclosure and sale of the said Minnesota and Pacific Railroad, said expenses to be certified to by the Governor, and shall be required as a guaranty of their good faith to deposit with the Governor of Minnesota, on or before the first day of July, 1861, ten thousand dollars in cash, or state or United States stocks, at their current value in New York city, which sum so deposited shall be absolutely forfeited to the state of Minnesota on failure of said company to construct said road from St. Paul to St. Anthony on or before the first day of January, 1862; provided, that upon the construction thereof said company so making such deposit shall be and are hereby authorized to withdraw said sum of money or stocks so deposited as aforesaid.

SEC. 5. This company shall have the power to enter upon and pass over the railroad of any other company whose railroad connects with that of this company, with their cars and engines, and any other company whose railroad connects with that of this company shall have power to enter upon the railroad and pass over the same with their cars and engines, and such reciprocal use of said respective roads shall be upon such terms and conditions as shall be agreed upon by the said respective companies, and in case the two companies cannot agree upon said terms and conditions, then either party
274 may, upon ten days' notice, apply to the Governor of the State, who shall appoint three competent and disinterested persons to determine said terms and conditions, whose decision shall be final and conclusive for the period of three years, when, at the end of each three years then either company may require a new appointment of persons in the manner aforesaid to readjust said terms and conditions.

SEC. 6. That all persons, their heirs or legal representatives, who were entitled to the right of preemption under the laws of the United States, to any of the lands granted to this state by the act of Congress of March 3, 1857, for railroad purposes, at the time when the line of said road was definitely fixed and located, and which by this act are restored to said company, and who have heretofore occupied the same in good faith, and shall have continued in the occupancy thereof at the time when the said company shall become entitled to the fee thereof, shall be at liberty to purchase the same of said company for the sum of one dollar and twenty-five cents per acre; provided, that application therefor, and proof of the right to purchase, shall be made within six months after the fee of said lands shall be acquired by said company as aforesaid.

SEC. 7. The stockholders of said company may, by a vote of the

majority thereof in interest, reduce the number of directors to seven, a majority of whom shall constitute a quorum.

SEC. 8. This act shall take effect and be in force from and after its passage.

Approved March 8, 1861.

275 DEFENDANT'S EXHIBIT 12.

An Act to Facilitate the Construction of the Minnesota and Pacific Railroad, and to Amend and Continue the Act of Incorporation Relating Thereto.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That all the rights, benefits, privileges, property, franchises and interests of the Minnesota and Pacific Railroad Company, acquired by the State of Minnesota, by virtue of any acts, deeds, agreement or thing by the said company heretofore done or suffered, or by virtue of any law of the state, or the Constitution thereof, or of the former territory of Minnesota, or by reason of any sale of the same, or any part thereof, by the Governor of the state, on the twenty-third day of June, eighteen hundred and sixty, and bid in and purchased for the benefit of the state, be and the same are hereby granted and transferred to Dwight Woodbury, Henry T. Welles, R. R. Nelson, Edmund Rice, Edwin A. C. Hatch, James E. Thompson, Leander Gorton, Richard Chute and William Lee, their associates and successors, for the purpose and on the terms and conditions hereinafter in this act provided, free and clear of all claims or liens thereon, and free from all liens and claims by or to the state of Minnesota, except as hereinafter provided.

SEC. 2. All the rights, privileges, franchises, lands, property and interests granted by the territory of Minnesota to the Minne-
276 sota and Pacific Railroad Company, by the act of said territory, approved May twenty-second, one tho-sand eight hundred and fifty-seven, entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the state of Alabama to aid in the construction of a certain railroad in said state,'" approved March third, eighteen hundred and fifty-seven, are hereby continued and granted to and vested in the said Dwight Woodbury, Henry T. Welles, R. R. Nelson, Edmund Rice, Edwin A. C. Hatch, James E. Thompson, Leander Gorton, Richard Chute and William Lee, and their associates and successors, with all the immunities, rights, property, benefits and privileges which the said the Minnesota and Pacific Railroad Company had, or might, or could have by reason of the passage of said act, free and clear of all claims and liens thereon, and free from all liens and claims of the state of Minnesota against the same, except such as are retained by the provisions of this act; and the said persons hereinbefore named, and their associates and successors,

shall hereafter be known as the Saint Paul and Pacific Railroad Company, and by that name may sue and be sued, and have and exercise all the powers, rights and privileges which heretofore pertained to the said the Minnesota and Pacific Railroad Company, by the act hereinbefore referred to, or by
277 any other act or law; and the persons hereinbefore named shall be the directors of the said Saint Paul and Pacific Railroad Company for one year, and until others are elected or appointed in their places.

SEC. 3. The provisions in this act contained are upon condition that the said The Saint Paul and Pacific Railroad Company shall complete and put into operation, and fully equip for business, that portion of the main line of said road extending from St. Paul to St. Anthony on or before the first day of September next, and that portion of the branch line of said road extending from Saint Anthony to Anoka, by the first day of January, eighteen hundred and sixty-four, and to Saint Cloud by the first day of January, eighteen hundred and sixty-five, and those portions of the main line of said road extending from Stillwater to Saint Paul, and from Saint Anthony, by way of Minneapolis, westwardly to the west line of range thirty, within one year from the expiration of the time last aforesaid; and to Little Falls by the first day of January, eighteen hundred and sixty-six, and thereafter to continue to construct and put into operation, fully equipped for business, the said road or branch at the rate of thirty miles annually, and all of said road or branch on or before the third day of March, eighteen hundred and sixty-seven; provided, that as evidence of the good faith and ability of said company to construct the portion of said road between Saint Anthony and Anoka within the time named herein, said company shall deposit with the Governor of the state, on or before the first day of January, 1863, in
278 money or bonds of the United States, or of this state, or some state of the Union in good credit, the sum of ten thousand dollars, to remain in the hands of the Governor until the first day of January, 1864, or until said road shall be completed to Anoka, as provided by this act, when such deposit shall be returned by the Governor to said company, or to the party who shall have made such deposit, on the surrender of the receipt given therefor; but if said road from Saint Anthony to Anoka shall not be completed and the cars running thereon by the time last named, said deposit shall become absolutely the property of the state, and shall be disposed of as the Legislature shall direct.

SEC. 4. The board of directors of the Saint Paul and Pacific Railroad Company shall consist of seven persons, who shall be elected by the stockholders annually, four of whom, at least, shall be citizens of the United States, and any loyal citizen thereof shall be eligible to the office of director, and a majority shall constitute a quorum; and meetings of said board may be held within or without this state; provided, that in the election of directors, and at all other elections or meetings of said company, a majority of votes shall govern. Each share of full paid stock shall entitled the holder thereof to one vote, and upon any shares of stock not fully paid up the holder shall be

entitled to one vote and no more for each hundred dollars actually paid, but no stock shall be voted on upon which there shall
279 be then due any unpaid installment or assessment.

SEC. 5. In case the said The Saint Paul and Pacific Railroad Company shall fail to construct, put into operation and fully equip for business that portion of said road extending from Saint Paul to Saint Anthony on or before the first day of January next all the rights, benefits, privileges, lands, property and franchises conferred upon said company by virtue of this act, or any law of the state or territory of Minnesota heretofore passed, shall thereupon become forfeited to the state absolutely, without any judicial or legal proceedings, or any further act or ceremony whatever; and in case the said company shall fail to construct the other and further portions of said road and branch, as provided by this act, and at or within the time or times herein specified, or shall fail to make the deposit required to be made by the provision to section three of this act by the time named herein, all the lands, property, privileges, rights and franchises of the said company pertaining to the unbuilt portions of said road and branch shall thereupon become forfeited to the state absolutely, and without any further act or ceremony whatever, or any judicial or legal proceedings therefor, in which case the said state shall hold the same without merger or extinguishment, to be used, granted and disposed of for the purpose of aiding in the construction of said road as aforesaid, and in either case, or in any forfeiture whatever under the provisions of this act, the state shall hold and be possessed of
280 all such lands, and property, and franchises so forfeited, without merger or extinguishment, to be used, granted or disposed of, for the purpose of aiding and facilitating the construction of said road and branch.

SEC. 6. For the purpose of aiding in the construction of the Saint Paul and Pacific Railroad, and the branch thereof, all the interest of the state, present and prospective, in and to any and all the lands granted by Congress to the territory of Minnesota, for the purpose of aiding in the construction of a road from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone lake and the mouth of the (Big) Sioux Wood river, with a branch, via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, agreeably to the terms of an act of Congress, which was approved March 3d, 1857, together with all and singular the rights, privileges and immunities conferred and intended to be conferred by said act of Congress, are hereby granted to the said St. Paul and Pacific Railroad Company, conditioned that said land shall be applied to the construction and equipment of said road, and for no other purpose whatever. Whenever said company shall actually complete that portion of the road between St. Paul and St. Anthony, so that regular trains of cars are running thereon, and not before, the Governor shall certify the same to the Secretary of the Interior, and thereupon the title to one hundred and twenty sections of land shall vest in said company. And when twenty continuous
281 miles of said road shall be completed, and regular trains running thereon, the title to a further quantity of one hundred

and twenty sections of land shall vest in said company. And whenever said company shall actually complete twenty continuous miles of said road from Minneapolis westwardly, so as to admit of the running of regular trains of cars on the same, the Governor shall certify the same to the Secretary of the Interior, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said company, and so on, as often as any further twenty continuous miles of said road shall be completed, so as to admit of the regular running of trains of cars thereon, the Governor shall in like manner certify the same to the Secretary of the Interior, and a further quantity of one hundred and twenty sections of said land shall vest in said company; and it shall be the duty of the Governor, whenever said road shall be completed between St. Paul and St. Anthony, in his official capacity, and on behalf of the state, to convey to said company one hundred and twenty sections of land; and whenever any further twenty continuous miles of said road or its branches shall be completed and in operation, the Governor shall in like manner convey a further quantity of one hundred and twenty sections of land, and so on, as often as any further twenty continuous miles of said road or its branches shall be completed, shall in like manner convey to said company a further quantity of one hundred and twenty sections of land, until there shall be conveyed to
282 said company all the lands to which they shall be entitled, according to the terms and provisions aforesaid; provided, that upon the written authority of said company, filed with the state treasurer, said lands, when the company is entitled thereto, may be conveyed by the state directly to the assigns of said company.

SEC. 7. Section nineteen, of chapter three, of the act to which this act is amendatory, is hereby amended so far as it relates to the St. Paul and Pacific Railroad Company, so as to read as follows:

Whenever, after cars commence running on said road or branch, any owner or occupant of lands adjoining the same shall enclose his or her lands by constructing a fence on the line of said railroad, said company shall construct and maintain one-half of the same as a partition fence, the other half to be erected and maintained by the owner or occupant of such adjoining land; and all fences erected on the line of said road, which may form part of any adjoining enclosure, shall be regarded as a partition fence, subject to the laws now or hereafter in force regulating such fences between individuals. Said company shall construct and maintain suitable cattle guards at all public road crossings, except street crossings in towns and cities; and at the request of the respective owners through whose lands the said road passes, shall make and maintain such reasonable farm crossings as shall be necessary to accommodate said land owners; and the said company shall be liable for all damages sustained by any person by reason of any neglect on the part of said company
283 to comply with the provisions of this section, unless the same shall arise from the carelessness, negligence or misconduct of the person, his agents or servants, who may suffer such damage.

So much of section twenty-four, chapter one, and section nineteen,

of chapter three, of the act to which this act is amendatory, so far as they relate to the fencing and cattle-guards affecting the said St. Paul and Pacific Railroad Company, is hereby repealed. At any time after the expiration of ten years, from and after the passage of this act, the Legislature shall have full power to alter, modify or change the provisions of this section, to require the entire construction and maintenance by the company of all such fences along the lines of their said road and branch, and prescribe such rules and regulations concerning the same as in their judgment shall seem best.

SEC. 8. That all persons, or their assigns, or legal representatives who, in good faith, settled upon any of the lands hereby granted to the said The Saint Paul and Pacific Railroad Company, at or prior to the time when when the line of said road and branch was definitely fixed and located, with a view to pre-empt, and who have continued to occupy the same, shall be at liberty to purchase such land at two dollars and fifty cents per acre, if within the six mile limits of the line of said road; and if without such limits, at one dollar and twenty-five cents per acre; provided, that application therefor and proof of the right to purchase shall be made within six months
284 after the fee of said lands shall be acquired by said company.

SEC. 9. It shall not be lawful for said company to issue capital stock, or make any mortgage or lien on said roadbed, superstructure, rolling stock or other property connected with said road, or make any sale of, or create or give any lien or mortgage on any lands granted to construct said road, for any debt, liability or obligation of the Minnesota and Pacific Railroad Company, or for any debt, liability or obligation hereafter to be incurred by the said Saint Paul and Pacific Railroad Company, excepting for the *bona fide* purpose of constructing, completing and equipping said road or branch, until after it shall have been completed for the running of cars thereon to a point opposite St. Cloud, in the said branch, and to the west side of range thirty-one on the main line of said road; provided, that no lien, mortgage or other incumbrance shall be made on any of the uncompleted roads or lands after the completion of the road to St. Cloud, except for the *bona fide* purpose of constructing said uncompleted roads.

SEC. 10. If at any time on or before the first day of September next said road between Saint Paul and Saint Anthony shall be completed for the running of cars thereon, it shall be the duty of the Governor, at any time after such completion as aforesaid, on the presentation and surrender of the receipt given therefor, to return to the holder of such receipt the bonds and scrip, with the accrued interest on the same, which were deposited with the
285 Governor in June, one thousand eight hundred and sixty-one, on behalf of the Minnesota and Pacific Railroad Company, under the provisions of the act approved March eight, one thousand eight hundred and sixty-one.

SEC. 11. The Saint Paul and Pacific Railroad Company shall transport, by all regular trains, all passengers and freight delivered

the same by any connecting line of railroad now or hereafter to
built, in the same manner, and at no greater rates, than for the
e being shall be charged by said Saint Paul and Pacific Railroad
mpany for the same service to persons living on the line of said
d; provided, that any such connecting line shall be governed by
same rules in transporting passengers and freight over their said
es delivered to them by said Saint Paul and Pacific Railroad
mpany.

SEC. 12. That no execution issued or to be issued upon any judg-
nt now nor hereafter to be rendered against the Minnesota and
cific Railroad Company, or any liability incurred prior to Janu-
y 1, 1862, shall be levied upon any of the lands, property or
nchises by this act granted to the said Saint Paul and Pacific Rail-
ad Company, unless specially directed to make such levy by a
cree or judgment of the court; nor shall any injunction to stay
impede the construction of the railroad to be constructed or com-
eted under the provisions of this act by said Saint Paul and Pa-
cific Railroad Company, be allowed or issued, except upon
86 complaint filed and adequate security by injunction bond
given, nor until after the service of the notice of the appli-
ation therefor upon the said company, at least sixty days prior to
e time of such application, which application must be heard at
me general term of the court in the proper county. Such applica-
on shall be heard upon the complaint and answer, and determined
ereon according to the practice and of course of decisions of courts
like cases.

SEC. 13. All acts and parts of acts inconsistent with or repugnant
the provisions of this act are hereby repealed.

This act to take effect and be in force from and after its passage.

Approved March 10, 1862.

DEFENDANT'S EXHIBIT 13.

An Act to Amend the Charter of the Saint Paul and Pacific Railroad Company.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. The Saint Paul and Pacific Railroad Company shall have power to create and issue, in such manner and on such terms as it may deem expedient, one or more classes of preferred stock and special stock, and to make such agreements as it may deem proper with the respective holders thereof, as to the dividends thereon, and the securities for such dividends; and to make such agreements as
it may deem proper with the holders of any such special
287 stock, for the appropriation of the net earnings of any por-
tion of the railroad which it may construct or otherwise ac-
quire, to the payment of dividends on such special stock, as may be issued in respect thereto; which appropriation, as made by such agreement, shall be effectual to secure the said and future holders of such stock the application of such net earnings, as in the said

agreement provided, against any future act of the company, or any of its general liabilities.

And the said company may make such agreements as it may deem proper with the holders of any such special stock as to the administration of the portion of said railroad, and the land grant appertaining thereto, to which said stock may pertain; and for the separate organization of the holders of such special stock for the purpose of that administration, and enabling them, or directors chosen by them separately, or in conjunction with the other directors, to exercise, in respect to the portion of the road to which such special stock may pertain, all the powers of the company, subject to the provisions of such agreement when made and entered into.

SEC. 2. The Saint Paul & Pacific Railroad Company shall have power to provide in any mortgage or deed of trust which it may issue covering or conveying any portion of its road now built, or hereafter to be built, that the holders of the bonds secured by such deeds of trust or mortgage shall have the right to vote at any meetings held for the election of directors of said company or for
288 any other purpose; such voting power to be to such extent as may be provided for, either in such deed of trust or mortgage, or in the bonds issued by said company. And all meetings, both of directors or stockholders of said company, may be held either within or without the state of Minnesota, in the city of London, England, or in any foreign state or country, as shall be provided for in the by-laws of said company; and all or any of the directors may be residents of the city of London aforesaid, or of any foreign state or country.

SEC. 3. The Saint Paul and Pacific Railroad Company may consolidate the whole or any portion of its branch railroads from Saint Paul to Winona, and all the property, rights, powers, franchises, grants and effects pertaining to such branch railroads, with the rights, powers, franchises, grants and effects of any other railroad company, either within or without this state, upon such terms and conditions as such company, or a majority of the directors of such respective companies, may respectively agree; and the railroad company in which such branch railroad shall become vested by such consolidation shall thereafter hold and enjoy all the rights, grants, powers and franchises in respect to such branch which the company possessed before the consolidation; but the said St. Paul and Pacific Railroad Company shall remain vested with all its other rights, powers, privileges and franchises; and the said Saint Paul and Pacific Railroad Company may in like manner consolidate any other
289 portion or part of its main line, or any or all of its branches, also with any other railroad company or companies, either within or without this state, or any other state or country, foreign or domestic.

SEC. 4. The Saint Paul and Pacific Railroad Company shall have the right to construct and maintain suitable bridges over any stream or river upon the line of its road and branches, or which may be required to connect the same with any other road in this state, or

any other of the United States, or any foreign state or country; but shall maintain suitable draws over all navigable streams, so as not to materially impede navigation.

SEC. 5. Whenever the Saint Paul and Pacific Railroad Company shall complete ten continuous miles of the main line of said road from some point on the present constructed line in Saint Anthony by way of Minneapolis, westwardly, with regular trains running thereon, the Governor shall certify the same to the Secretary of the Interior, and thereupon a further quantity of one hundred and twenty sections of land shall vest in said company, and so on as often as any further twenty continuous miles shall be completed, with regular trains running thereon, the Governor shall in like manner certify the same to the Secretary of the Interior, and a further quantity of one hundred and twenty sections of land shall vest in said company.

SEC. 6. The Saint Paul and Pacific Railroad Company shall have the right to re-locate the lines of its road and branches so as to run and construct the main line from Saint Anthony, by way of
290 Minneapolis, to any point between the foot of Big Stone lake and the mouth of the Sioux Wood river, and the branch from Saint Anthony to the Red River of the North, so as to run and construct the same from some point at or near St. Cloud to any point in the international boundary near the Red River of the North, and it shall not be required of the said company to construct or maintain the said branch road to or by the way of Crow Wing.

SEC. 7. The Saint Paul and Pacific Railroad Company shall complete those portions of their road from Stillwater to Saint Paul, and from St. Anthony by way of Minneapolis, westwardly, to the distance of twenty miles, within two years, and the remaining portion of the main line, and part of the branch line from Saint Cloud to Red River of the North, within five years, and there shall be no forfeiture of any of the lands, property, privileges, rights or franchises of the said company for a failure to complete the same, or any part thereof, prior to the times above specified.

SEC. 8. The said St. Paul and Pacific Railroad Company is hereby authorized and empowered to extend, survey, locate, construct, maintain and operate its road from some point at or above Saint Cloud to the westerly end of Lake Superior; and for the purpose of extending, locating, constructing and operating the same, the said company shall have and may exercise all the rights, immunities, privileges and franchises conferred in and by its charter, and which are applicable to any other portion of its road or branch road.

291 SEC. 9. This act shall take effect and be in force from and after its passage.

Approved February 6, 1864.

DEFENDANT'S EXHIBIT 14.

Whereas, the St. Paul & Pacific Railroad Company did, on the 3rd day of May, 1862, enter into a contract with Messrs. Litchfield & Co., of Brooklyn, in the state of New York, for the construction

and equipment of the road of the St. Paul & Pacific Railroad Company from the city of St. Paul to a point upon or near the Mississippi river called Watab, a distance of eighty miles from St. Paul, excepting that portion of said road then being built by Winters & Drake, between the city of St. Paul and the city of St. Anthony, upon certain conditions therein named.

And whereas, several causes, among which are the Indian difficulties in this state, the low stage of water in the Mississippi river and the general advance in the price of labor, of iron and other materials, have combined very largely to increase the cost of said road;

And whereas, by the terms of said first named agreement the said St. Paul & Pacific Railroad Company agreed to issue to Litchfield & Co., in part payment for the construction and equipment of the road above named, three hundred and fifty thousand dollars of the full paid stock of said company, and further agreed that no other
292 issue of stock should be made except a sum not to exceed sixty thousand dollars, as was in said agreement provided;

And whereas, by the terms of an act of the Legislature of the state of Minnesota, approved on the 6th day of February, A. D. 1864, entitled "An Act to amend the Charter of the St. Paul & Pacific Railroad Company," the said company was empowered to create and issue in such manner and upon such terms as it might deem expedient one or more classes of preferred stock and special stock, and to make such agreements as it may deem proper with the respective holders thereof as to the dividends thereon and the securities for such dividends, and to make such agreements as it may deem proper with the holders of any such special stock for the appropriation of the net earnings of any portion of the railroad which it may construct or otherwise acquire to the payment of dividends on such special stock as may be issued in respect thereto, which appropriation as made by such agreement shall be effectual to secure to the said and future holders of such stock the application of such net earnings as in said agreement provided against any future act of the company, or any of its general liabilities, and was authorized also to make such agreements as it may deem proper with the holders of any of such special stock as to the administration of the portion of said railroad and the land grant appertaining thereto to which said stock may pertain, and for the separate organization of the
293 holders of such special stock for the purposes of that administration and enabling them or directors chosen by them separately or in conjunction with the other directors to exercise in respect to the portion of the road to which such special may pertain all of the powers of the company subject to the provisions of such agreements when made and entered into.

And, whereas, since the passage of said act there has been issued by the St. Paul & Pacific Railroad Company to E. B. Litchfield, of the firm of Litchfield & Co. aforesaid, certificates of stock for thirty-five hundred shares of one hundred dollars per share, which said shares are created and issued under said act as preferred and special stock pertaining to that portion of the road of said company which

extends from St. Paul, in the county of Ramsey, to Watab, in the county of Benton.

And whereas, under the provisions of said act the said St. Paul & Pacific Railroad Company have issued to the said E. B. Litchfield certificates of stock for five thousand shares of one hundred dollars per share, which said shares are created and issued under said act as preferred and special stock pertaining to that portion of the road of said company which extends from St. Anthony to a point between the foot of Big Stone lake and the mouth of Sioux Wood river.

And whereas, the said St. Paul & Pacific Railroad Company are desirous of securing the completion of the lines of railroad above named with the least possible delay.

Now, therefore, this agreement made and entered into this
294 6th day of February A. D. 1864, by and between the St. Paul & Pacific Railroad Company, party of the first part, and E. B. Litchfield, of the city of Brooklyn, in the state of New York, as the owner and holder of the said preferred and special stock hereinbefore mentioned party of the second part.

Witnesseth, that the party of the first part, in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the party of the second part, have sold, and they do hereby sell, assign, transfer and set over unto the said party of the second part all the rights, benefits, privileges, property, franchises and interests of the party of the first part, as a body corporate under the laws of the territory or state of Minnesota belonging to that portion of the lines of said company which extend from St. Paul, in the county of Ramsey, to Watab, in the county of Benton, a distance of eighty miles, together with the lands granted by Congress to the territory of Minnesota for the purpose of aiding in the construction of said eighty miles of road, and all the rights, benefits, privileges, property, franchises and interests of the party of the first part as a body corporate as aforesaid, belonging to that portion of the lines of said company which extends from St. Anthony to a point between the foot of Big Stone lake and the mouth of Sioux Wood river, together with the lands granted by Congress to the territory of Minnesota for the purpose of aiding in the construction of said line of road, together with the right to extend the line of
295 railroad from its terminus at a point between the foot of Big Stone lake and the mouth of the Sioux Wood river to any point on the Missouri river north of the 45th parallel of north latitude, and to increase the capital stock equal to the full cost of said railroad and extension.

And the said party of the first part covenants and agrees with the said party of the second part that the lines of road above named are clear and free from any liability to any director of the present or any former board of directors of said company, for services performed, rights of way furnished, or any claim of any nature of any director or directors as aforesaid, as against the St. Paul & Pacific Railroad Company or Litchfield & Co., contractors, so far as the lines herein intended to be conferred are concerned, except certain

claims for special stock upon that part of the line from St. Paul to Watab, which are hereinafter more particularly named and set forth.

And the said party of the first part further agrees that no stock shall be issued nor any liabilities incurred either general or special by the said party of the first part chargeable to any portion of the lines of road herein conveyed, except for the purposes and in the manner hereinafter particularly specified.

And the said party of the first part farther agrees that no transfer shall be made of any of the lands belonging to the main line for that portion of the main line from Stillwater to St. Paul until the full quantity of three thousand eight hundred and forty
296 (3,840) acres per mile is secured to the party of the second part, for that portion of the main line herein intended to be conveyed, excepting (76,800) seventy-six thousand eight hundred acres selected by Winters & Drake, as follows: All the lands situated in Ranges (23, 24, 25) Twenty-three, Twenty-four, Twenty-five and the Two most easterly tiers of sections of Range (26) Twenty-six, being a length on the main line of a continuous twenty miles, and for indemnity the lands within nine miles on each side, if so much is required, and if more is required the indemnity lands in Ranges (26 an- 27) Twenty-six and Twenty-seven, or enough thereof to make the full quantity of one hundred and twenty (120) sections.

And the said party of the first part further agrees that the administration of the portions of said railroad and the land grant appertaining thereto shall belong solely and exclusively to the holder or holders of the special stock hereinbefore named conjointly as to that portion of said road which extends from St. Paul to Watab with the holders of stock hereinafter provided for, and that the holder or holders of such special stock may form a separate organization for the purposes of such administration, with a board of directors chosen by the holder or holders of such special stock, exercising in respect to the portions of the road to which such special stock pertains all the powers of the St. Paul & Pacific Railroad Company over the lines of road hereby transferred, subject only to the provisions of this agreement.

297 In consideration of the foregoing agreement entered into by the St. Paul & Pacific Railroad Company the said party of the second part, for himself, his heirs, assigns and successors, agrees to build and complete the lines of road herein conveyed, as required by the acts of Congress making the grant of lands in aid thereof, and as required by the acts of the Legislature of the state of Minnesota.

And the said party of the second part, for the separate organization herein contemplated, agrees to assume all liabilities of the party of the first part, so far as the same relate to the lines of road hereinbefore mentioned, of every name and nature, and to save the said party of the first part harmless therefrom, including the contract with Winters, Harshman & Drake, dated March 11th, 1862, and the contract with A. B. Smith and Z. G. Simmons, dated Sept. 21st, 1863, relative to a line of telegraph along said roads.

And the said party of the second part further agrees to choose, without unnecessary delay, a separate board of directors, which said board, under the name and style of "The 1st Division of the St. Paul & Pacific Railroad Company," and their legal successors, it is agreed by the parties hereto shall exercise, in respect to the portions of the lines of road hereinbefore transferred, all the powers of the St. Paul and Pacific Railroad Company thereunto appertaining, subject only to the provisions of this agreement.

And the said party of the second part further agrees that the said Board of Directors when so organized shall, upon the request
298 of the persons named below, and upon the surrender of certificates of stock for a corresponding number of shares in the St. Paul & Pacific Railroad Company, issue certificates of stock to such persons, which said shares when so issued shall be placed upon an equal footing with the special stock created and issued to the party of the second part upon that portion of said line from St. Paul to Watab last above named, to-wit:

To Edmund Rice, five shares	$500
" R. R. R. Nelson, do	500
" Wm. Lee, do	500
" Richard Chute, do	500
" Leander Gordon, do	500
" Edmund Rice, President, two hundred and sixty-one shares	261
" E. C. Palmer, four shares	400
" Alex. Ramsey, one hundred shares	10,000
" Dwight Woodbury, one hundred shares	19,000
" E. F. Drake, seventeen shares	1,700
" Jonathan Harshman do	1,700
" Valentine Winters, sixty-six shares	6,600

It is mutually understood and agreed by and between the parties hereto that this sale and transfer is made subject to a contract made and entered into on the 11th day of January, A. D. 1864, between the party of the first part and the Chicago and North Western Rail-
road Company, relative to the construction of that part of
299 the line which extends from St. Paul to Winona, and the consolidation of that part of said line with said Chicago and North Western Railway Company, and that the provisions of said contract may be carried out, and said consolidation perfected by the parties to said contract according to the true intent and meaning thereof.

It is further mutually understood and agreed by and between the parties hereto that in case the said contract with the Chicago & North Western Railway Company for any reason should fail to be carried out and executed, then the party of the first part shall have the right to construct said line of road from St. Paul to Winona, and to connect with the lines hereinbefore conveyed, upon the same terms as are in said contract expressed, or may enter into a contract containing similar provisions with any other corporation, company or person.

And it is further mutually understood and agreed by and between the parties hereto that this sale and transfer is made subject to any agreement which may be made hereafter by the party of the first part for the construction, extension or transfer of that portion of the branch line beyond Watab.

The said road from St. Paul to Watab to transport men and materials over the same for the construction of the said line above Watab, which shall be done upon fair and reasonable rates, and no contract shall be made for such extension without an agreement which shall be binding upon the party of the second part
300 hereto, and upon the second organization hereinbefore provided for, and upon the party contracting for the said extension beyond Watab, that said roads shall forever run in connection with each other, and shall never contract with other competing lines for the business properly belonging to either of said lines, the true intent and meaning of such agreement to be that the running connections shall be mutual and exclusive one with the other.

It is further mutually understood and agreed by and between the parties hereto that in any arrangements hereinafter made for the said extension of said line of road beyond Watab provision shall be made that in case the parties interested shall fail to agree upon the terms of the running connections between the line from St. Paul to Watab, and the extension of said line beyond Watab, the subject shall be referred to the superintendents of the respective roads who, in case of disagreement, shall select a referee who shall be authorized to settle finally all questions in dispute.

It is further mutually understood and agreed by and between the parties hereto that upon the completion of the transfer of the lines hereinbefore named pursuant to the terms of this agreement the St. Paul & Pacific Railroad Company shall be relieved from all the terms and conditions of the contract between said company and Litchfield & Co., dated May 3rd, 1862, and the same shall be assumed by the organization contemplated by this agreement

301 In witness whereof, the said party of the first part hath caused these presents to be signed by its President, attested by its Secretary, and its corporate seal to be hereunto attached, and the party of the second part hath hereunto affixed his hand and seal, executed at St. Paul, Minnesota, this 6th day of February, A. D. 1864, in triplicate.

THE ST. PAUL & PACIFIC R. R. CO.,
By EDMUND RICE, *President*.

[CORPORATE SEAL.]

Attest:
HENRY ACKER, *Sec'y*.

Signed, sealed and delivered in the presence of
R. F. MATTERSON.
G. L. BECKER.

E. B. LITCHFIELD. [L.S.]

ST. PAUL. *February 6th*, 1864.

The foregoing agreement is made with the knowledge and consent of Litchfield & Co., and the contracts between the St. Paul & Pacific Railroad Company and Litchfield & Co. are modified in accordance therewith.

LITCHFIELD & CO. [SEAL.]

Stockholders' Meeting.

Pursuant to notice given by E. B. Litchfield, Esq., a meeting of the holders of the preferred or special stock created and issued by the St. Paul & Pacific Railroad Company upon the lines of road mentioned in the foregoing agreement, was held at the office of said company in St. Paul, on the 6th day of February, 1864.

302 Present, the following named persons:

E. B. Litchfield, holding 3,500 shares stock on road from St. Paul to Watab and 4,964 shares of stock on road from St. Anthony to a point between the foot of Big Stone lake and the mouth of Sioux Wood river.

W. B. Litchfield, assignee of E. B. Litchfield of 5 shares of stock on road from St. Anthony to a point between the foot of Big Stone lake and the mouth of Sioux Wood river.

F. R. Delano, same stock as above.

Jared Benson, same stock as above.

H. Thompson, same stock as above.

G. L. Becker, same stock as above.

Not present: Thos. A. Harrison, assignee of E. B. Litchfield of 5 shares of stock as above, and Leander Gorton, stock as above.

On motion of Jared Benson, G. L. Becker was called to the chair, and S. S. Breed was requested to act as secretary.

The foregoing Act of the Legislature, together with the agreement between the St. Paul & Pacific Railroad Company and E. B. Litchfield, as holder of the preferred stock named therein, were submitted to the meeting.

On motion of E. B. Litchfield it was resolved that this meeting proceed to the election of a Board of seven Directors for the First Division of the St. Paul & Pacific Railroad Company, to serve until the second Tuesday of June next, and until their successors are duly elected and qualified, said board to be charged with the

303 administration of the lines of railroad mentioned in the foregoing agreement, together with the land grant appertaining thereto, and to exercise the powers of the St. Paul & Pacific Railroad Co. in respect to said lines of road subject to the provisions of the foregoing agreement.

On motion of F. R. Delano the President and Secretary of the meeting were requested to act as tellers, whereupon the vote was cast with the following result:

Geo. L. Becker, of St. Paul, received 8,490 votes.

Horace Thompson, St. Paul, received 8,490 votes.

Jared Benson, Anoka, received 8,490 votes.

W. B. Litchfield, St. Paul, received 8,490 votes.
Thos. A. Harrison, Minneapolis, received 8,490 votes.
F. R. Delano, St. Paul, received 8,490 votes.
Leander Gorton, St. Cloud, received 8,490 votes.

And the above named gentlemen, having received all the votes cast, were declared to be duly elected as the Board of Directors of the First Division of the St. Paul & Pacific Railroad Company.

On motion of E. B. Litchfield the meeting thereupon adjourned.

GEO. L. BECKER, *Chairman.*

SAM'L S. BREED, *Sec'y.*

ST. PAUL, *Feb'y 6th*, 1864.

At a meeting of the Directors of the 1st Division of the St. Paul & Pacific Railroad Co. there was present the following named members of the board: Messrs. Geo. L. Becker, H. Thompson, Jared Benson, W. B. Litchfield and F. R. Delano.

304 Mr. Jared Benson was appointed Chairman *pro tem.* and Mr. F. R. Delano was requested to act as Secretary.

On motion of Mr. G. L. Becker it was voted that the board proceed to a permanent organization by the election of a President, Vice President, Secretary, Treasurer and Superintendent. Whereupon,

Geo. L. Becker was elected President.
Wm. B. Litchfield was elected Vice President.
Sam'l S. Breed was elected Secretary.
Horace Thompson was elected Treasurer.
Francis R. Delano was elected Superintendent.

On motion G. L. Becker and W. B. Litchfield were appointed a committee to prepare by-laws.

On motion of W. B. Litchfield it was resolved that George L. Becker be constituted the Commissioner of the Land Department of this company, and that he be authorized to make all contracts relative to the sale or lease of lands granted to the territory of Minnesota by an Act of Congress, approved March 3rd, 1857, to aid in the construction of the lines of road belonging to this company, and that Horace Thompson be constituted the Treasurer of the Land Department, and that all contracts or lease of said land are hereby required to be signed by said Land Commissioner, and countersigned by said Treasurer.

On motion of F. R. Delano it was resolved that the President and Secretary of this company be authorized and directed to issue

305 certificates of stock of this company on the line from St. Paul to Watab to the persons named in the agreement between the St. Paul & Pacific Railroad Company and E. B. Litchfield upon the demand of the persons named or their legal representatives, and upon the surrender by them of the certificates of stock therein named, said certificates of stock so issued to correspond in number of shares and amount with the stock so surrendered.

On motion the Secretary was directed to notify the trustees of real estate mortgage of the appointment of Geo. L. Becker Land Commissioner, and H. Thompson Treasurer Land Department.

On motion the Secretary was directed to have a record of the agree-

ment with the St. Paul & Pacific Railroad Company recorded by the Secretary of State.

On motion the board adjourned until Monday, February 8th, 1864, 2 o'clock P. M.

GEO. L. BECKER, *President.*

SAM'L S. BREED, *Sec'ty.*

Filed in this office May 4, 1864.

B. BLAKELY,
Sec'y of State.

(Duly certified by the Secretary of State of Minnesota.)

306 DEFENDANT'S EXHIBIT 15.

An Act to Legalize and Confirm the Organization, Acts, and Proceedings of the First Division of the St. Paul and Pacific Railroad Company, and in Relation to the Character and Powers of said Company.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That the holders of the preferred stock and special stock, issued by the St. Paul and Pacific Railroad Company under the authority of an act of the Legislature of the State of Minnesota, approved on the 6th day of February, A. D. 1864, entitled "An act to amend the charter of the St. Paul and Pacific Railroad Company," and as recited in the agreement made on the same day, under said act, between the said company and E. B. Litchfield, of which agreement a copy, with a report of the organization thereunder, was filed in the office of the Secretary of State, on the 4th day of May, A. D. 1864, under and pursuant to an act of the said Legislature, approved on the 4th day of March, A. D. 1864, entitled "An act authorizing the registry of certain railroad organizations, with the agreements under which the organizations were made," be, and they are hereby authorized to use, possess, enjoy and exercise all the rights, benefits, privileges, property, franchises, powers and interests of the St. Paul and Pacific Railroad Company, as a body corporate, belonging
307 or pertaining to that portion of the lines or road of said company which extends from St. Paul, in the county of Ramsey, to Watab, in the county of Benton, including all the lands granted by Congress to aid in the construction of the road of said company, and which belong or pertain to such portion of said road; and all the rights, benefits, privileges, property, franchises, powers and interests of the said company, as a body corporate, as aforesaid, belonging or pertaining to that portion of the lines of road of said company which extends from St. Anthony to a point between the foot of Big Stone lake and the mouth of the Sioux Wood river, including all the lands granted by Congress to aid in the construction of that portion of the lines or road of said company last above mentioned, subject only to the provisions of said agreement, and subject to all the conditions and limitations respecting the construction and

completion of said road, or any part thereof, imposed by existing laws; provided, that nothing in said agreement, or in the acts of said company, in pursuance thereof, affecting in any manner any of the lands donated by Congress for the purpose of constructing, or appertaining to, that portion of the St. Paul and Pacific Railroad, extending from Stillwater to St. Paul, shall be deemed to be ratified or confirmed hereby, but all the lands belonging and originally designed for and appropriated to the construction of said road from Stillwater to St. Paul, shall remain irrevocably dedicated thereto;

and the acceptance by the First Division of the St. Paul and
308 Pacific Railroad Company, of this act, either by resolution or by acting under it, shall be deemed a full release to the state of Minnesota of any and all rights which said First Division of the St. Paul and Pacific Railroad Company may have acquired in or to any of the said lands by virtue of such agreement.

SEC. 2. The holders of the aforesaid preferred stock and special stock, their successors and assigns, are authorized to use, possess, enjoy and exercise all and singular the said rights, benefits, privileges, property, franchises, powers and interests under the corporate name and style of the First Division of the St. Paul and Pacific Railroad Company, and by that name shall have perpetual succession, and shall have and enjoy all the powers, privileges, franchises and immunities incident to a corporation, may acquire by purchase or otherwise, and hold, convey, sell and lease property and estates, either real, personal or mixed; may make, and have, and use a common seal, and alter or renew the same at pleasure, may sue and be sued, plead and be impleaded, answer and be answered, defend and be defended against, contract and be contracted with, and generally may do and perform all and every act and thing which may be necessary or requisite to the full enjoyment and exercise of all and singular the privileges, franchises, powers, rights, benefits, property and interests by this act, and the said agreement transferred or conferred upon them.

SEC. 3. The organization of the holders of said preferred
309 stock and special stock, under the name of "The First Division of the St. Paul and Pacific Railroad Company," in pursuance of the act of the Legislature and of the agreement hereinbefore referred to, and all the acts and proceedings of said organization not contrary to law nor to the terms of said agreement, are hereby sanctioned, confirmed and legalized.

SEC. 4. This act shall take effect and be in full force from and after its passage.

Approved February 6, 1866.

DEFENDANT'S EXHIBIT 16.

An Act to Aid and Facilitate the Completion of the Saint Paul and Pacific Railroad and Branches.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That the time for the grading and completion of the respective portions of the line of railroad of the Saint Paul and

Pacific Railroad Company, as now fixed by law, be extended for the period of two years, and that all the rights, privileges, franchises and lands conferred by act of the Legislature of the state of Minnesota, approved March 10th, 1862, be restored, released and granted to the said company, free and clear of all claim or lien of the said state thereto; and the said company shall have the right and power to extend and construct said road from Winona to La Crescent; pro-
vided, and this act is upon the express condition, that the said
310 company shall compete and equip that portion of the road from Elk River to Saint Cloud, with the cars running thereon, on or before the 1st day of September, in the year eighteen hundred and sixty-six, and from thence, in a northerly direction, to St. Vincent, on the international boundary line, within the time limited by law; also, that said company shall build that portion of said road heretofore known as the St. Paul and Winona branch, by way of and through the following cities and villages, to-wit: Hastings, Red Wing, Lake City, Wabasha and Minneiska.

And provided, that said company shall, on or before the first day of July, 1866, remove their track from the present line through First street, in Saint Anthony, to a line not nearer the Mississippi river than Sixth street, except that they may depart from the above requirements so far as may be necessary in the extension and construction of their road across the Mississippi river.

And provided further, that the said company shall be, and are hereby required to transport wood on their road and branches at a rate not exceeding the rate charged for other similar freights.

And it is further provided, That in consideration of an annual payment of a per centum (as provided in this section) by said corporation as aforesaid, the railroad, its appurtenances and appendages, and all other property, estate and effects of said corporation, which by the provisions of this act contained, said corporation is to acquire,
purchase, hold, possess, enjoy or use, for, in or about the con-
311 struction, equipment, removal, repair, maintaining or operating its railroad, as also the stock and capital of said company shall be and hereby are forever exempt from all taxation and from all assessments; and in consideration of the grants made to, and the privileges and franchises conferred upon the company hereby created, and of the exemption contained in this section, the said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March of each and every year, pay into the treasury of the State one per cent. on the gross earnings of said railroad, the first payment to be made on the first day of March next, after the said railroad shall be completed and in operation; and shall, during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this State, on or before the first day of March of each and every year, two per cent., on the gross earnings of said railroad; and shall from and after the expiration of ten years from the completion of thirty miles of said railroad, on or before the first day of March of each and every year, pay into the treasury of this State three per cent of the gross earnings of said

railroad; and the payment of such per centum annually as aforesaid, shall be, and is in full of all taxation and assessment whatever.

And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company, to
312 the treasurer of this state, on or before the first day of February in each year, the truth of which abstract shall be verified by affidavits of the treasurer and secretary of said company; and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the Governor of this State, or any other person appointed by law prescribed to examine, under oath, the officers and employés of said company or other persons; and if any person so examined by the Governor or other authorized persons, shall knowingly or willfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the State the payment of the aforesaid per centum, it is hereby declared that the State shall have a lien upon the railroad of said company, and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the State shall take and have precedence of all demands, decrees and judgments against said company; provided, further, that the lands of said company shall be subject to taxation as soon as sold, leased, or contracted to be sold or leased.

And provided, further, that that portion of the road, extending from Saint Paul to Stillwater, shall be completed, with the cars running thereon, on or before the expiration of two years from the passage of this act.

313 Provided, That said railroad company shall grade ready for the ties, within one year from the passage of this act, at least ten continuous miles of said branch road, from Saint Paul to Winona; provided further, that the said company shall, within two years from the passage of this act, construct and put in complete running order, twenty consecutive miles of their branch road, between Winona and Saint Paul.

SEC. 2. Any and all additional grants of land made prior to the passage of this act, or which may hereafter be made by the congress of the United States to the State of Minnesota, for the purposes of aiding in the construction of the lines of railroad, or any portion of them, authorized to be constructed by the Saint Paul and Pacific Railroad Company, shall inure to the benefit of said company; and said lands, and the present and future interest of the State in or to them, are hereby granted and assigned unto the said company upon the same terms and conditions as the lands heretofore granted for the same purpose, together with the conditions contained in said act of Congress donating the same. And the title of all lands heretofore, or hereafter granted by the Congress of the United States to the State of Minnesota, for the purposes aforesaid, shall vest in said company at the time, and upon the terms prescribed by said acts of Congress making the grant; and it shall

be the duty of the Governor, on behalf of the State, to convey
314 to said company the lands so granted, according to the terms and provisions contained in the act or acts aforesaid.

SEC. 3. Nothing contained in any act or law shall be so construed or held as to prohibit in the future the Saint Paul and Pacific Railroad Company from creating and issuing any bonds, mortgages, deeds of trust, or other securities or liens upon the whole of their lines of railroads and branches, and the lands appertaining thereto, or so much thereof as they may deem meet and expedient as one consolidated line.

SEC. 4. Any or all the directors of the Saint Paul and Pacific Railroad Company may be citizens or subjects of any foreign country.

And the directors of said company may change the name of said company to that of (the) Winona, Saint Paul and Pacific Railroad or Railway Company, if they shall deem it fit and proper so to do.

This act shall take effect from and after its passage; and this and all acts relating to the Saint Paul and Pacific Railroad Company, and to the lines authorized to be constructed by them are hereby declared to be public acts.

Approved March 2, 1865.

315 DEFENDANT'S EXHIBIT 17.

An Act in Relation to the Taxation of Lands Granted to the Saint Paul and Pacific Railroad Company.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That whenever any lands heretofore or hereafter granted to the Saint Paul and Pacific Railroad Company to aid in the construction of its road or branches, shall be contracted to be sold, conveyed or leased by said company, the same shall be placed upon the tax list by the proper officers for taxation, as other real estate, for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made; but in enforcing the collection of the taxes thereon, the title or interest of the said company, or of any trustee or mortgagee thereof, shall be in no wise impaired or affected thereby, but the improvements thereon, and all the interest of the purchaser or lessee therein, may and shall, in case of default of the payment of taxes upon such land, be sold to satisfy the same; and it shall be the duty of the proper officers to assess and collect such taxes, in accordance with the general laws relating to the assessment and collection of taxes, and that the provisions of the several acts in relation to the taxation of the lands of said company, so far as the mode of taxing such lands conflicts with the provisions of this act shall be, and they are hereby repealed.

316 SEC. 2. That upon the filing of said company, in the office of the Secretary of State, of a notification of its acceptance of this act, the same shall thereupon become obligatory upon the State, as well as upon said company; provided, that said notice of acceptance shall be given within sixty days.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved March 4, 1865.

DEFENDANT'S EXHIBIT 18.

At a special meeting of the board of directors of the Saint Paul and Pacific Railroad Company held pursuant to the call of the president at the office of the company in Saint Paul on the 14th day of March, 1865, there were present the following directors: Hon. R. R. Nelson, vice president, presiding; Messrs. H. F. Welles, Dwight Woodbury and J. E. Thompson; on motion of Mr. Welles it was

Resolved by the board of directors of the Saint Paul and Pacific Railroad Company that the act of the legislature of the state of Minnesota entitled "An Act to aid and facilitate the completion of the Saint Paul and Pacific Railroad and branches" approved March 2nd, 1865, and the act of the legislature of the state of Minnesota entitled "An Act in relation to the taxation of lands granted to the Saint Paul and Pacific Railroad Company" approved March
317 4th, 1865, and the terms and provisions of the same and each of them be and they are hereby accepted and adopted by the Saint Paul and Pacific Railroad Company.

And be it further resolved that the executive officers of this company be and they are hereby directed to file in the office of the secretary of state a certified copy of the foregoing resolution as a notification of the acceptance by this company of said acts.

R. R. NELSON, *Act'g Pres't.*
HENRY ACKER, *Secretary.*

Office of the Saint Paul & Pacific Rail Road Company.

SAINT PAUL, MINNESOTA, *March 16th*, 1865.

We hereby certify that the foregoing is a true and correct copy and transcript from the records of the Saint Paul and Pacific Railroad Company and that the foregoing resolutions were adopted by the unanimous vote of the board of directors of the said company at their meeting on the 14th day of March, 1865.

R. R. NELSON,
Vice Pres't & Acting Pres't.
[CORPORATE SEAL.] HENRY ACKER, *Secretary.*

(Int. Rev. stamp 5 cents.)

Filed in this office Mar. 16, 1865.

D. BLAKELEY.
Sec. of State.

Book 1, Official Letters & Communications, page 70.
(Duly certified by the Secretary of State of Minnesota.)

318 DEFENDANT'S EXHIBIT 19.

Office of First Division St. Paul and Pacific R. R. Comp.

ST. PAUL, *April 28th*, 1865.

Honorable D. Blakely, Secretary of State.

SIR: At a special meeting of the board of directors called by the president and held at the office of the company in the city of St. Paul April 28th, 1865, the following resolutions were unanimously adopted:

"Resolved, that this company hereby accept of the provisions of an act of the legislature of the state of Minnesota approved March 4, 1865, entitled "An act in relation to the taxation of lands granted to the St. Paul & Pacific Rail Road Company."

Resolved that the secretary of this company be directed to file in the office of the secretary of state of Minnesota a copy of these resolutions as a notification of the acceptance of said act by this company.

[CORPORATE SEAL.] SAML D. BREED,
Sect. 1st Div. St. Paul & Pacific R. R. Co.

Filed in this office Apr. 29, 1865.

D. BLAKELY,
Sect. of State.

Book 1, Official Letters & Communications, page 71.
(Duly certified by the Secretary of State of Minnesota.)

319 DEFENDANT'S EXHIBIT 20.

An Act to Amend the Charter of the Saint Paul and Pacific Railroad Company.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That the name of the Saint Paul and Pacific Railroad Company, and that of any of its branches or any division or portion of its roads, subject to the control of said company, may be changed by a resolution of the board of directors of said company, to any other name or names, and upon filing a duly authenticated copy of such resolution in the office of the Secretary of State, the said company, or branch, division or portion of said road, shall be known by the name or names respectively adopted and designated in such resolution, and the stockholders may by resolution increase their directors to any number not exceeding fifteen.

SEC. 2. The time limited for the grading and completing the respective portions of the road of said company, is hereby extended for the period of two years. But this extension shall not extend or apply to that portion of said road extending from Stillwater to Saint

Paul, nor to that portion of said road extending from Saint Anthony, via Minneapolis, to a point between the foot of Big Stone Lake and the Sioux Wood River; Provided that if twenty miles of said road extending from Lake Superior to a point at or
320 above St. Cloud shall not have been put into operation, with the cars running thereon, by the second day of March, eighteen hundred and seventy, the lands appertaining thereto shall revert and be passed over to the Minneapolis and Saint Cloud Railroad Company; and Provided, further, that this railroad company shall not have the power to consolidate with any other railroad company within this State.

SEC. 3. This act shall be deemed and held to be a public act, and shall take effect from and after its passage.

Approved March 2, 1867.

DEFENDANT'S EXHIBIT 21.

An Act to Authorize the First Division of the Saint Paul and Pacific Railroad Company to Extend its Branch Line from Saint Cloud, via Sauk Centre and Alexandria, to the Red River of the North.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That the First Division of the St. Paul and Pacific Railroad Company is hereby authorized to survey, locate and construct a branch railroad from St. Cloud, via Sauk Centre, and Alexandria, to some point on the Red River of the North, to be by said company designated; provided, that said company shall be bound to carry freight and passengers upon said proposed extension upon reasonable rates.

321 SEC. 2. That the laws now in force relating to the construction and operation, and all the provisions of the charter of the First Division of the St. Paul and Pacific Railroad Company, so far as applicable, shall be extended to and be in force for the construction and operation of the branch road authorized by this act.

SEC. 3. That if it shall be found convenient for the construction and operation of said proposed extension of said railroad, said company is hereby authorized to create general, or common, or special or preferred stock applicable to said road, and may provide by agreement for the management of the business of said road, authorized by this act, as a distinct, separate, interest; and it may provide that stocks, bonds, debts, or liabilities issued or contracted for the benefit of said branch, shall apply to and bind only the property thereof, and may in like manner provide that debts and liabilities contracted for the benefit of the other lines of said company, shall not be a lien or incumbrance on the line authorized by this act.

SEC. 4. Said company may, by resolution of its board of directors, designate the name by which said extension may be known, to take effect after public notice of such change or designation shall be given for one month in one of the daily newspapers of the city

St. Paul; but such change of name shall not affect any right- liabilities of said company under any former name.

SEC. 5. This act shall take effect immediately.

Approved March 6, 1869.

22 DEFENDANT'S EXHIBIT 22.

n Act to Authorize the First Division of the St. Paul and Pacific Railroad Company to Locate, Extend, and Construct its Main Line from its Present Authorized Terminus to the Northern Boundary of the State of Minnesota.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That the First Division of the St. Paul and Pacific Railroad Company is hereby authorized to survey, locate, construct nd extend its main line from its present authorized terminus between the head of Big Stone Lake and the mouth of Sioux Wood River, by the most practicable route down the valley of Red River, o such point on the northern boundary of the state as said company nay select.

SEC. 2. That the laws now in force relating to the construction nd operation, and all the provisions of law affecting the First Division of the St. Paul and Pacific Railroad Company, so far as pplicable, necessary and convenient, shall be extended to and be n force for the construction and operation of the line of road authorized by this act.

SEC. 3. That if it shall be found convenient for the construction or operation of said line of road, said company is hereby authorized to create, general or common, or special, or preferred stock, 323 applicable to said extended line of road, and may provide by agreement for the management of the business of said line of road authorized by this act as a distinct and separate interest, nd they may provide that stock, bonds, debts or liabilities issued or contracted for said extended line, shall apply to and bind only the property of said line, and may in like matter provide that debts and liabilities contracted for the benefit of other lines of said company shall not be a lien or incumbrance on the line hereby authorized.

SEC. 4. Said company may, by resolution of its board of directors, designate the name by which said extended line may be known, to take effect after public notice of such change or designation shall be given for one month in one of the daily papers of the city of Saint Paul, but such change shall not affect any rights or liabilities of said company under any former name.

SEC. 5. This act shall take effect and be in force from and after its passage.

Approved February 18, 1870.

324 DEFENDANT'S EXHIBIT 23.

An Act to Authorize the First Division of the Saint Paul and Pacific Railroad Company to Construct a Branch from Some Point on its Branch Line to Princeton, in the County of Mille Lacs.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That the first Division of the St. Paul and Pacific Railroad Company is hereby authorized to survey, locate and construct a branch railroad from its branch line, at some point on said branch line, running thence by the most practicable route to Princeton, in the county of Mille Lacs: provided, that the said company shall be bound to carry freight and passengers upon said branch railroad upon reasonable rates.

SEC. 2. That the laws now in force relating to the construction and operating, and all the provisions of the charter of the First Division of the Saint Paul and Pacific Railroad Company, so far as applicable, necessary and convenient, shall be extended to and be in force for the construction and operation of the branch road authorized by this act.

SEC. 3. That if it shall be found convenient for the construction or operation of said branch road, or of any portion of its main or branch line, said company are hereby authorized to create general,
325 or common, or special, or preferred stock, applicable to said branch road or to its main and branch lines, or either of them, and may provide by agreement for the management of the business of said road, authorized by this act, as a distinct separate interest, and they may provide that stock, bonds, debts or liabilities, issued or contracted for the benefit of said branch, shall apply to and bind only the property of said branch, and may, in like manner, provide that debts and liabilities contracted for the benefit of the main line shall not be a lien or incumbrance on the branch line.

SEC. 4. The said company may, by resolution of its board of directors, designate the name by which said branch line may be known, to take effect after publication of such change or designation shall be given for one month in one of the daily papers of St. Paul, but such change of name shall not affect any rights or liabilities of said branch line under any former name.

SEC. 5. This act shall take effect and be in force from and after its passage.

Approved March 4, 1870.

326 DEFENDANT'S EXHIBIT 24.

An Act to Authorize the First Division of the Saint Paul and Pacific Railroad Company, to Construct a Branch Line from Some Point in Meeker or Wright Counties, to the Village of Hutchinson, in McLeod County.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. The First Division of the Saint Paul and Pacific Railroad Company is hereby authorized to construct a branch line of railroad, extending from some point in Meeker or Wright counties, to the village of Hutchinson, in McLeod County, and the various provisions of the several Acts of Legislature, relating to the First Division of the Saint Paul and Pacific Railway and its branches, are hereby extended to the branch line hereby authorized, so far as the same are applicable. Provided, that passengers and freight shall always be carried over the line of railway hereby authorized, at such equitable and reasonable rates as may from time to time be fixed by law.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved March 3, 1876.

327 DEFENDANT'S EXHIBIT 25.

An Act to Amend Chapter Two Hundred and One of the Special Laws of One Thousand Eight Hundred and Seventy-seven, Entitled "An Act to Provide for the Completion of the Lines of Railroad Commonly Known as the St. Paul and Pacific Extension Lines."

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. Section six (6) of said act is hereby amended so as to read as follows:

(Section 6). The time for the completion of the uncompleted portions of the line of railroad extending from St. Cloud to St. Vincent, commonly known as the "St. Vincent branch of the St. Paul and Pacific extension lines," is hereby extended as follows:

From Melrose to Sauk Center, until August one (1), A. D. one thousand eight hundred and seventy-eight (1878).

From Sauk Center to Alexandria, until December one (1), A. D. one thousand eight hundred and seventy-eight (1878).

From Crookston to St. Vincent, until January one (1), A. D. one thousand eight hundred and eighty (1880).

From Alexandria to Fergus Falls, until January one (1), A. D. one thousand eight hundred and eighty (1880).

328 From Fergus Falls to Glyndon, until January one (1), A. D. one thousand eight hundred and eighty-one (1881).

Provided, however, that such extensions of time are made subject to all the provisions of this and of the succeeding sections of this act,

In case the St. Paul and Pacific Railroad Company, its successors or assigns, shall fail to complete any of the said portions of the said line of railroad, within the times therefor limited in this section, in that case the portions of said line of railroad then remaining uncompleted, together with the land-grant, rights, franchises, immunities, and property appertaining thereto, shall at once be and become absolutely forfeited to the State of Minnesota, without any act or ceremony whatsoever; and it shall be the duty of the Governor forthwith, upon such failure, to enter upon and take possession for and in the name of the State, all and singular the portions of road so remaining uncompleted, and all and singular the land-grant, rights, franchises, immunities and property appertaining thereto; and upon such forfeiture, all and singular the lines of road, land-grant, rights, franchises, immunities and property so forfeited, shall be held by the State without merger or extinguishment, to be used and regranted for the construction of said line of road. In case any forfeiture of any portion of the said line of road, should occur under the provisions of this section, then, in that case, any company or corporation now organized, or that may hereafter organize, having authority from that State to build, maintain and
329 operate a line of railroad within or through this State, may succeed to and acquire the right to complete, own, maintain and operate the uncompleted portions of said line of railroad upon the route and through the village of Sauk Center, Alexandria and Fergus Falls, hereinbefore in this section named, by filing with the Governor a written notice of its desire and intention, under and subject to the provisions of this act, to complete, equip, maintain and operate all the then uncompleted portion of said line of railroad, and shall at the same time deposit the sum of twenty thousand ($20,000) dollars, in money or negotiable bonds, equivalent in value thereto, with the State Treasurer, as a guarantee that it will fully complete and put in operation all the then unbuilt portions of said line of railroad, which money or bonds shall be returned to the company depositing the same, upon presentation to the State Treasurer of the certificate of the Governor to the effect that such company has completed and equipped all uncompleted portions of said line of railroad, within the time specified in this act; but in default of such completion and equipment, the said money or bonds shall, without further ceremony, be forfeited to the State, to be thereafter used to aid in the construction of that portion of said line of railroad extending from Melrose through Alexandria and Evansville to Fergus Falls.

If at the time the said line of railroad becomes forfeited to the State, as hereinbefore provided, the portion of said line of
330 railroad extending from Melrose through Alexandria to Fergus Falls, is uncompleted, then the company proposing to build the uncompleted portions of said line of railroad, as hereinbefore provided, shall first build the portion of said line of railroad extending from Melrose through Alexandria to Fergus Falls, and shall complete that part of such portion extending from Melrose to Alexandria, within one (1) year after filing the written notice

hereinbefore mentioned, and from Alexandria to Fergus Falls within two (2) years after the filing of said notice. But upon default to commence work or to prosecute the same to completion within the time aforesaid, such company shall forfeit all right to complete, maintain or operate the portion of said line remaining uncompleted at the time of such default, without further act or ceremony, to be used and granted for the construction of such line of road.

SEC. 2. Section seven (7) of said act is hereby amended by striking out the word "section" in the eighth (8th) line of said section seven (7) of the published act, and inserting in lieu thereof the word "act."

SEC. 3. Said section seven (7) is further amended by striking out all that portion of said section after the word "company" in the nineteenth (19th) line of said section of the published act, and inserting in lieu thereof the following: But neither the Saint Paul & Pacific Railroad Company nor any other company accepting or acting under the provisions of this act, shall be entitled to receive or demand any of the lands granted by the United States to the State of
331 Minnesota to aid in the construction of said line of railroad until that portion of said line of railroad extending from Melrose to Alexandria is fully completed, with cars running thereon; but when such portion is so completed, then, and not before, the Governor of the State may convey or certify to the company building such portion not to exceed two hundred thousand (200,000) acres of said lands, and a further quantity of two hundred thousand (200,000) acres in case the portion of said line of railroad extending from Crookston to St. Vincent is also completed, from the lands accruing to said road north of Crookston, and not within the indemnity limits: Provided, nothing shall be construed under this act which will waive the right of the state to receive the full grant of ten (10) sections per mile of completed road from the United States. And when that portion of said line of railroad extending from Alexandria by way of Evansville to Fergus Falls, is fully completed, with the cars running thereon, then, and not before, the Governor of the State may convey or certify to such company all the rest, residue and remainder of the lands granted by the United States to the State of Minnesota to aid in the construction of said line of railroad. The Governor of the State is hereby expressly prohibited from conveying or certifying to such railroad company any of said lands otherwise, at other times, in other quantities, or upon other conditions than in this section provided.

SEC. 4. Section nine (9) of said Act is hereby amended
332 by striking out that portion of said section commencing with the words "and one-half," in the fourth (4th) line of said section, and ending with the words "any part thereof" in the eighth (8th) line thereof. Also by striking out the words and figure "three" (3) where they occur in the last two (2) lines of said section, and inserting in lieu thereof the word and figure "one" (1).

SEC. 6. This act shall take effect and be in force from and after its passage.

Approved March 9, 1878.

DEFENDANT'S EXHIBIT 26.

The First Division of the Saint Paul and Pacific Railroad Company to George L. Becker, Horace Thompson and George T. M. Davis. Deed of Trust.

This indenture, made the first day of October in the year of our Lord, one thousand eight hundred and sixty-five, at St. Paul in the State of Minnesota, between the first division of the St. Paul and Pacific Railroad Company, a body corporate, created by the acts of the legislature of the state of Minnesota, hereinafter referred to, party of the first part, and George L. Becker and Horace Thompson of the city of St. Paul and state of Minnesota and George T. M. Davis of the city and state of New York, parties of the second part, Witnesseth:

Whereas, by an act of the senate and house of representatives of the United States of America in congress assembled approved
333 on the third day of March in the year of our Lord one thousand eight hundred and fifty-seven, entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections to aid in the construction of certain railroads in said territory and granting public lands in alternate sections to the state of Alabama, to aid in the construction of a certain railroad in said state," there was granted by the United States of America to the territory of Minnesota for the purpose of aiding in the construction of railroads from and to certain points and places mentioned in said act (to which act, reference is hereby made for a particular description thereof) every alternate section of land designated by odd numbers for six sections in width on each side of said roads and branches, except in cases where it should appear that the United States had, when the lines or routes of said roads were definitely fixed, sold any of such sections or parts of sections, or that right of pre-emption had attached to the same; and in such cases, it was provided by said act of congress that there should be granted to said territory for the like purposes before mentioned, so much land nearest to the tiers of sections above specified in alternate sections, or parts of sections, as should be equal to such lands, as the United States may have sold or otherwise appropriated, or to which the rights of pre-emption may have attached; the same to be selected by any agent or agents to be appointed by the governor of said territory or future state of Minnesota, subject to the approval of the secretary of the interior,
334 and to be located not further than fifteen miles from the lines of said railroad or branches, and it being provided by said act that the lands thereby granted for and on account of said roads and branches severally, should be exclusively applied in the construction of that road, for and on account of which such lands were thereby granted and should be disposed of only as the work progresses.

And, whereas, by an act of the senate and house of representatives of the United States of America, in congress assembled, approved on

the third day of March, in the year of our Lord, one thousand eight hundred and sixty-five, entitled: "An act extending the time for the completion of certain land grant railroads in the states of Minnesota and Iowa and for other purposes," it was provided that the quantity of lands granted to the state of Minnesota to aid in the construction of certain railroads in said state, as indicated in the first section of the act above quoted, approved March third, eighteen hundred and fifty-seven, shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts, and as was thereinafter provided (to which act reference is hereby made).

And whereas, the legislative assembly of the late territory of Minnesota, by an act approved on the twenty-second day of May, in the year of our Lord 1857, entitled "An act to execute the trust created by an act of congress, entitled 'an act making a grant of land
335 to the territory of Minnesota, in alternate sections to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections of the state of Alabama to aid in the construction of a certain railroad in said state,' and granting certain lands to railroad companies therein named," did create and declare the persons therein named a body politic and corporate by the name and style of The Minnesota and Pacific Railroad Company and did authorize and empower the said company to locate, construct, maintain and operate a railroad with one or more tracks or lines of rail on such route as said company should think proper from Stillwater by way of St. Paul and St. Anthony, via Minneapolis to the town of Breckenridge on the Sioux Wood River, with a branch from St. Anthony via Anoka, St. Cloud and Crow Wing, to St. Vincent, near the mouth of the Pembina river, the said railroad and branch being one of the railroads and branches specially mentioned in and provided for by said act of congress; and for the purpose of aiding in the construction of the said railroad and branch did grant to said company all the interest and estate present and prospective of said territory and of the future state which should succeed it, in or to any or all of the lands granted by the government of the United States to the territory of Minnesota, for the purpose of aiding in the construction of a railroad from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood river, with a branch
336 via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, to the point hereinbefore mentioned, under and by virtue of an act of congress approved on the third day of March, 1857, hereinbefore referred to, together with all and singular the rights, privileges and immunities conferred or intended to be conferred by said act of congress; conditioned that said land should be exclusively applied to the construction of the road hereinbefore described, the title to all which lands was to be vested in said company in various parcels from time to time in accordance with the provisions of said act of the legislative assembly of the late territory of Minnesota, to which provisions reference is hereby made by the party of the first part hereto and subject to which, and subject

also to an act enacted by the leg' lature of the state of Minnesota, entitled "An Act to facilitate the construction of the Minnesota and Pacific Railroad and to amend and continue the act of incorporation relating thereto," approved March 10th, 1862, this indenture is executed.

And Whereas, the said Minnesota and Pacific Railroad Company by the eleventh section of said Act of the legislative assembly of the late territory of Minnesota was expressly authorized and empowered in its corporate capacity to borrow money from any person or persons, corporation or body politic of any kind and for any rate of interest which might be agreed upon by and between said company and any person or party of whom such loan might be ob-
337 tained any law on the subject of usury, of said territory or future state, or any state where such transaction might be made, to the contrary notwithstanding; and to make, execute and deliver all necessary writings, notes, bonds, mortgages or other obligations and securities in amount and kind as might be deemed expedient by said company, in consideration of any such loan, or in discharge of any liabilities which it might incur in the construction, repair, equipment or operating of said road; and by the twenty-first section of said act of the legislative assembly of the late territory of Minnesota, the same company was further expressly authorized and empowered in its corporate capacity to make, execute, issue and deliver, its bonds and obligations in any amount which the directors thereof might deem necessary or expedient, and to prescribe the sum or sums for which each of said bonds shall be issued, the time or times, and place or places when and where the principal and interest of the same should be payable, the person or persons, the trustee or trustees, or corporation to whom or to which they shall be payable, and whether payable to order or to bearer or how otherwise negotiable the rate of interest which said bonds shall bear, and the manner and form in which the interest coupons annexed to them shall be executed; and for the purpose of securing the payment of all or any of said bonds; the said company was further, by said twenty-first section of said act of the legislative assembly of the late territory of Minnesota, expressly authorized and em-
338 powered in its corporate capacity to make, execute and deliver one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches constructed or authorized to be constructed, and of the estate granted by the said act of which said section was a part, and any and all other of its estate, real, personal or mixed, in possession or expectancy, and in and by such mortgage or deed of trust, to confer upon the trustee or mortgagee full and ample powers to enter into and upon and take possession of, have, use and employ or to sell and dispose of the whole or any part of said railroad and branches, and all corporate and other franchises, rights and privileges of the said company; and in case of any such sale, to grant and convey to the party or parties acquiring title under such sale, and their associates, successors and assigns, all and the same rights, privileges, grants, franchises, immunities and advantages in and by such mortgage or deed of trust enumerated and conveyed,

which belonged to or were enjoyed by said company, as fully and absolutely, in every respect as said company, its stockholders, officers and agents might or could have done if such sale or foreclosure had not taken place; and the directors of said company were further, by said twenty-first section of said act of the legislative assembly of the late territory of Minnesota, authorized and empowered to prescribe, by resolution to be by them adopted, all matters relating to the form and terms of any such mortgage or deed of trust, and of its execution and delivery, and the said company being further authorized
339 and empowered by said twenty-first section of said act of the legislative assembly of the late territory of Minnesota, through its agents or brokers or otherwise at any place, to sell, loan, pledge, hypothecate or otherwise dispose of any or all of the aforesaid bonds so as aforesaid authorized to be issued at par, or at any price less than par, and for such sum or sums and on such terms as to the said company, its agents or brokers, should appear most for its interest.

And whereas, the board of directors of said company after the passage of the said act of the legislative assembly of the late territory of Minnesota, at a meeting held in the city of St. Paul, Minnesota, on the twenty-fifth day of May, A. D. 1857, permanently organized by the election of Edmund Rice to be president, and R. R. Nelson to be vice president, and by the appointment of James W. Taylor to be secretary, of J. M. Stone to be treasurer, and of John B. Brisben to be attorney thereof, and after such organization by a resolution duly passed accepted the afore mentioned act of the legislative assembly of the late territory of Minnesota, approved on the twenty-second of May, A. D. 1857, and the grants thereby made so far as they related to or affected the interest of said company, upon the terms and conditions and according to the provisions in said act contained; a copy of which resolution, certified by the president and secretary of said company under its corporate seal was on the same day deposited in the office of the secretary of state of said territory of Minnesota.

340 And, whereas, by an act of the legislature of the state of Minnesota, entitled "An Act to facilitate the construction of the Minnesota and Pacific Railroad and to amend and continue the act of incorporation relating thereto, approved March 10, 1862," the Saint Paul & Pacific Railroad Company had become vested with all the immunities, rights, benefits, privileges, lands, property, franchises and interests formerly owned or possessed by the Minnesota and Pacific Railroad Company as in the said act provided, reference to which act is hereby made, and subject to which this indenture is executed.

And whereas, by an act of the legislature of the state of Minnesota, entitled "An Act to amend the charter of the Saint Paul and Pacific Railroad Company," approved February 6th, 1864, the St. Paul and Pacific Railroad Company were authorized to issue preferred and special stock and to make an agreement with the holder or holders of such special stock as to the administration of portions of said railroad and the land grant appertaining thereto, reference to

which act is hereby made and subject to which this indenture is executed.

And whereas, the St. Paul and Pacific Railroad Company did on the 6th day of February, 1864, issue special stock and transferred to the holders of such special stock their line of road with all the property, franchises and interests belonging to the line of road of said company, between the city of St. Paul and the village of Watab and between St. Anthony to a point between the foot of Big Stone
341 Lake and the mouth of Sioux Wood River, together with the lands granted by Congress to the territory of Minnesota for the purpose of aiding in the construction of said line of road with the right to extend the line of railroad from its terminus at a point between the foot of Big Stone Lake and the mouth of Sioux Wood River to any point on the Missouri river, north of the forty-fifth parallel of north latitude.

And, whereas, the holders of said special stock did, after such transfer at a meeting held in the city of St. Paul on the 6th day of February, 1864, permanently organize under the name and style of the First Division of the Saint Paul and Pacific Railroad Company, by the election of George L. Becker to be president, by the appointment of Samuel S. Breed to be secretary and Horace Thompson to be treasurer thereof, a copy of which agreement and organization has been deposited in the office of secretary of state of said state of Minnesota.

And whereas, the St. Paul and Pacific Railroad Company prior to the execution and delivery of this instrument has executed a trust deed to Walter L. Cutting, bearing date the eleventh day of March, 1862, of and upon so much of the said railroad as extends from the Mississippi river in St. Paul to and including the principal depot in St. Anthony, as well as other property to secure the payment of bonds of the said company, to the amount of one hundred and twenty thousand dollars with the interest thereon, and has also made and delivered a deed of trust or mortgage dated June 2nd,
342 1862, to Russell Sage, of the city of Troy, and Samuel J. Tilden, of the city of New York, trustees, and conveying the whole of the said railroad extending from St. Paul, via St. Anthony, Anoka and St. Cloud, to Watab, eighty miles from St. Paul, and the equipments and appurtenances and the franchises and things therein described to secure the payment of bonds of the said company to the amount of seven hundred thousand dollars, with interest thereon.

And whereas, the St. Paul and Pacific Railroad Company did, prior to the execution and delivery of this indenture, to-wit: On the 11th day of March, A. D. 1862, enter into a contract with Valentine Winters, Johnathan Harshman and Elias F. Drake for the completion and equipment of that portion of the St. Paul and Pacific Railroad which extended from St. Paul to St. Anthony, by the terms of which agreement said company agreed to assign, transfer and convey one hundred and twenty sections of land, being the first one hundred and twenty sections of land to which said company was entitled,

which said lands were conveyed to Valentine Winters in accordance with said agreement by deed June 30th, 1862, to which reference is hereby made, and subject to which this indenture is executed.

And whereas, the said Saint Paul and Pacific Railroad Company for the purpose of constructing the said eighty miles of road from St. Paul to St. Anthony and thence up the Mississippi river to
343 Watab, prior to the execution and delivery of this instrument, made and executed a deed of trust or mortgage upon its property and franchises to Edmund Rice and Horace Thompson of St. Paul and Samuel J. Tilden of New York bearing date the second day of June, A. D. 1862, to secure bonds amounting in the aggregate to one million two hundred thousand dollars, conveying all the right, title, interest, claim or demand of the said company of, in or to all those sections or parts of sections of land granted to the late territory of Minnesota by an act of Congress, approved March third, eighte-n hundred and fifty-seven, the title to which is hereinbefore given, for the purpose of aiding in the construction of certain railroads therein named, and which were subsequently granted to said company by the acts of the late territory of and of the state of Minnesota as hereinbefore stated, for the purpose of aiding in the construction of a railroad from St. Paul via St. Anthony, Anoka and St. Cloud to Watab, on the Mississippi river, being 3,840 acres of land for each mile, amounting in the aggregate to 307,200 acres, be the same more or less, and also the entire railroad of said company from St. Paul to Watab, as aforesaid, subject to the acts of Congress, of the legislature of the territory and state of Minnesota, and to the liens hereinbefore recited.

And whereas, the party of first part, for the purpose of completing said eighty miles of road from St. Paul to St. Anthony and thence up the Mississippi river via Anoka to Watab, and for the purpose also of enabling itself to retire the bonds hereinbefore
344 mentioned, which have been issued by the St. Paul and Pacific Railroad company, now outstanding has resolved to make and deliver its bonds secured by a deed of trust or mortgage upon its property and franchises, as hereinafter specified.

2,400 of said bonds so to be issued shall each be in the sum of one thousand dollars; 500 of said bonds shall each be in the sum of five hundred dollars; 600 of said bonds shall each be for two hundred and fifty dollars; and all numbered consecutively from one to thirty-five hundred inclusively, and shall be regularly numbered and signed by the president and secretary of the said party of the first part and registered and countersigned by the parties of the second part hereto, and shall bear interest (with coupons therefor attached) at the rate of seven per centum per annum, payable semi-annually, and the tax laid or to be laid by the government of the United States, and shall become due to the holders thereof on the 1st day of December, A. D. 1895, are to be issued as required for the purposes aforesaid, in the aggregate to the amount — $2,800,000, and are to stand equally and
345 ratably secured by these presents according to the respective amounts without any preference in respect to the times of their issue, and all of which bonds are in the form following:

$1,000.

UNITED STATES OF AMERICA, *State of Minnesota.*

Mortgage Bond.

Upon Land Grant of 1857, six section per mile.
Upon Land Grant of 1865, four sections per mile.
And upon eighty miles of railroad.

No. —.

The First Division of the St. Paul and Pacific Railroad Company.

Know all men by these presents that the first division of the Saint Paul and Pacific Railroad Company is indebted to the bearer hereof in the sum of one thousand dollars, lawful money of the United States of America for money borrowed for the construction of its road from St. Paul via St. Anthony, Anoka and St. Cloud to Watab, eighty miles from St. Paul, and in consideration of such indebtedness, the said First Division of the St. Paul and Pacific Railroad Company promises and agrees to pay to the bearer hereof on the 1st day of December, in the year one thousand eight hundred and ninety-five at the office or agency of the said company in the city of New York, the said sum of one thousand dollars with interest thereon, at the rate of seven per cent. per annum, payable at the said office or agency of the company in the city of New York in semi-annual installments on the first days of June and December, in each year, on delivery of the coupons hereto annexed, and
346 also to pay the government tax, and in case of the non-payment of any half-yearly installment of interest, which shall have become payable and shall have been demanded, if such default shall continue for six months after the maturity of said installment, the principal of this bond shall become due in the manner and with the effect provided in the deed of trust hereinafter mentioned. This bond is one of the series consisting of twenty-four hundred bonds, each for one thousand dollars; five hundred each for five hundred dollars, six hundred each for two hundred and fifty dollars; numbered consecutively from one to thirty-five hundred inclusively, all dated the first day of September in the year one thousand eight hundred and sixty-five, and the payment of which is secured by a deed of trust or mortgage made by the said company to Horace Thompson and George L. Becker, of St. Paul, Minnesota, and George T. M. Davis, of New York, trustees, conveying all the right, title and interest which the said company now has or may hereafter acquire by reason of the construction of the said eighty miles of railroad or any part thereof, to lands amounting to ten sections per mile granted to the state of Minnesota by acts of Congress, approved March 3rd, 1857, and March 3rd, 1865, for the construction of said eighty miles and conveying, also, the railroad from St. Paul to Watab, its equipments and appurtenances and the franchises and

things therein described, subject as to the ten miles of the said railroad from St. Paul to St. Anthony, to the prior lien, of a
347 trust deed made to Walter L. Cutting, trustee, to secure bonds amounting in the aggregate to one hundred and twenty thousand dollars and bearing date the eleventh day of March, 1862, and also subject as to the said railroad from St. Paul to Watab, to a deed of trust or mortgage made and delivered to Russell Sage, of the city of Troy, and Samuel J. Tilden, of the city of New York, trustees, bearing date 2nd June, 1862, to secure bonds amounting to $700,000 and the interest thereon, also, a mortgage to Edmund Rice and Horace Thompson, of St. Paul, and Samuel J. Tilden, of New York, to secure bonds amounting to $1,200,000. It is hereby agreed that this bond shall be received at its par value in payment of any of the said lands, which may be sold under the provisions of the said trust deed.

This bond shall pass by delivery or by transfer on the books of the company, in the city of New York or wherever else the said company may keep transfer books. After a registration of ownership certified hereon by the transfer agent of the company, no transfer except on the books of the company shall be valid, unless the last transfer be to bearer, which shall restore transferability by delivery. But this bond shall continue subject to successive registrations and transfers to bearer, as aforesaid, at the option of each holder. This bond shall not become obligatory until it shall have been authenticated by a certificate indorsed hereon and duly signed by the trustee; $2,020,000 to be held in trust by the trustees
348 and issued only upon surrender to them of a like amount of bonds above referred to.

In witness whereof the said company has caused its corporate seal to be hereto affixed, and the same to be attested by the signatures of its president and secretary, on this 1st day of September, in the year one thousand eight hundred and sixty-five.

—— ——, *Secretary.* —— ——, *President.*

Now, this indenture witnesseth that the party of the first part in consideration of the premises, and of one dollar to it in hand paid the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of the bonds aforesaid, issued or to be issued as herein recited and provided, and every part of the said principal and interest as the same shall become payable, according to the tenor of the said bonds and of the coupons thereto annexed, has granted, bargained and sold, and does by these presents, grant, bargain, sell, convey and transfer unto the parties of the second part all the right, title, interest, claim or demand which the said party of the first part now has, or which it shall or may hereafter acquire or become entitled to, of, in or to all those sections or parts of sections of land granted to the late territory of Minnesota by act of congress, the title to which is hereinbefore given, approved on the third day of March, A. D. eighteen hundred and fifty-seven, or to the state of Minnesota by an act of congress, the title to which is hereinbefore given, approved on the third day of March, 1865,

for the purpose of aiding in the construction of a railroad
349 from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood river with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the legislature of said territory might determine, and which were subsequently granted, to the Minnesota and Pacific Railroad Company, or to the said party of the first part by the acts of the late territory of, and the state of Minnesota, as hereinbefore stated, for the purpose of aiding the said Minnesota and Pacific Railroad Company, or the Saint Paul and Pacific Railroad Company, or the said party of the first part in the construction of a railroad from St. Paul via St. Anthony, Anoka and St. Cloud to Watab on the Mississippi river, being by the terms of said acts ten sections of land for each mile, amounting in the aggregate to 512,000 acres, be the same more or less, and situate in the present state of Minnesota, adjoining and adjacent to the line of the railroad of said party of the first part, as hereinbefore described, full lists of which will be appended to this instrument as said lands are surveyed, selected and certified, which said lists are to be signed by the president of the company, and to be taken and considered as part and parcel of this deed without reference to the dates of said lists, and also the entire railroad of the said party of the first part from St. Paul via St. Anthony, to the town of Watab on the Mississippi river, including all the railways, ways and rights of way, depot grounds and other lands;
350 all tracks, bridges, viaducts, culverts, fences and other structures; all depots, station houses, engine houses, car houses, freight houses, wood houses and other buildings; and all machine shops, whether now held or hereafter required for use in connection with the said railway or the business thereof; and including also, all locomotives, tenders, cars and other rolling stock or equipments, and all machinery, tools, implements, fuel and materials for the constructing, operating, repairing or replacing the said railway, or any part thereof, or any of its equipments or appurtenances, whether now held or hereafter required; and also all franchises connected with or relating to the said railway, or the construction, maintenance or use thereof now held or hereafter required by the said party of the first part; and all corporate franchises, including the franchise to be a corporation which are now, or may be hereafter possessed or exercised by the party of the first part.

Together with all and singular the endowments, income and advantages, tenements, hereditaments and appurtenances to the above mentioned lands, railroad or property belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, present or prospective of the said party of the first part, of, in and to the same, and any and every part and parcel thereof, with the appurtenances; subject, nevertheless, to the provisions and requirements of the above men-
351 tioned acts of congress, of the legislative assembly of the late territory of Minnesota, and of the legislature of the state of

Minnesota, and subject, as to the ten miles of the said railroad from St. Paul to St. Anthony, to the prior lien of the aforesaid trust deed made and delivered in escrow to Walter L. Cutting and bearing date the eleventh day of March, 1862; and subject also to the deed made by the St. Paul and Pacific Railroad Company to Valentine Winters, dated June 30th, 1862, the lands in said deed described being expressly excepted from the operation of this instrument; and also subject as to the said railroad from St. Paul to Watab, to the prior lien of the aforesaid deed of trust or mortgage made and delivered to Russell Sage, of the city of Troy, and Samuel J. Tilden, of the city of New York, trustees, and bearing even date herewith; and subject also as to the said railroad from St. Paul to Watab, to the prior lien of the aforesaid deed of trust or mortgage made and delivered by the St. Paul and Pacific Railroad Company to Edmund Rice and Horace Thompson, of St. Paul, and Samuel J. Tilden, of New York, trustees, and dated June 2nd, 1862.

To have and to hold the above described premises and appurtenances subject as aforesaid unto the said parties of the second part as joint tenants, and not as tenants in common, and the survivors and survivor of them, and to the heirs and assigns of such survivor to the only proper use and behoof of the said parties of the second part, and the survivors and survivor of them, and of the heirs
352 and assigns of such survivor.

In trust, nevertheless, for the purposes herein expressed, to-wit:

Article First. Until default shall be made in the payment of principal or interest of the said bonds, or of some of them, or until default shall be made in respect to something herein required to be done or kept by the said The First Division of the St. Paul and Pacific Railroad Company, the said company shall be suffered and permitted to possess, manage, operate and enjoy the said lands, and the said railway, with its equipments and appurtenances, and to take and use the rents, income, profits, tolls and issues thereof in the same manner and with the same effect as if this deed had not been made.

Article Second. Two millions and twenty thousand dollars of the bonds executed under the provisions of this instrument shall be held in trust by the parties of the second part, to be issued only upon the surrender to them of a like amount of bonds heretofore issued by the St. Paul and Pacific Railroad Company, under the provisions of the trust deed, dated March 11th, 1862, and delivered in escrow to Walter L. Cutting, or of the bonds issued by said company under the provisions of the trust deed or mortgage to Russell Sage and Samuel J. Tilden, dated June 2nd, 1862, or of the bonds issued by said company under the provisions of the trust deed or mortgage to Edmund Rice, Horace Thompson and Samuel J. Tilden, dated also June 2nd, 1862. The object and intention of this trust
353 being hereby declared to be to retire said bonds and substitute therefor the bonds hereinbefore provided for, until all of said bonds are so retired and the bonds hereinbefore provided for substituted for the same.

Article Third. All moneys arising from the sale of said land granted by act of congress, approved March 3rd, 1865, after deducting the expenses of executing this trust, are hereby pledged to the payment of said bonds, secured by this indenture, and of the interest coupons or warrants thereto annexed. And it is understood and agreed that after providing for the payment of principal and interest of all outstanding bonds secured by prior liens as hereinbefore mentioned, or after retiring the same as herein contemplated, all the moneys arising from the sales of any of said lands granted under either act of congress, after deducting expenses of executing this trust, are hereby pledged to the payment of the bonds provided for by this indenture, and of the interest coupons or warrants thereto annexed. And all such moneys shall be applied by the trustees from time to time as they shall receive the same.

First. To the payment of the interest coupons or warrants, annexed to said bonds, as fast as the same shall become due and payable.

Secondly. In purchasing and cancelling such outstanding bonds as can be obtained at their market value not exceeding, however, a premium of ten per cent.; and,

Thirdly. To the payment of such of the bonds themselves
354 as may not have been purchased in accordance with the foregoing provisions when the same shall have become due and payable. But it is understood and agreed that all the current net earnings and income of the said railroad of said party of the first part after deducting current expenses, and after paying the interest on the bonds secured by the prior liens above mentioned, and after complying with the provisions of the trust deeds or mortgages hereinbefore referred to, shall be appropriated and used from time to time, if necessary, in the payment of the interest on the bonds secured by this instrument.

Article Fourth. If there shall at any time be a default in the payment of any interest or principal upon the bonds secured by this instrument as the same shall become payable, and such default continue for six months, the trustees are authorized and empowered in their discretion to enter upon and sell at public auction, after notice published twice a week for six weeks in one or more newspapers in New York, St. Paul, and such other places as they may think proper, so much of said lands as shall be necessary to pay and satisfy such liabilities.

Article Fifth. All the trust moneys which shall come into the hands of the trustees, until the same shall be used or applied in accordance with the provisions herein contained, shall be invested in Minnesota state bonds or United States stocks, and the interest
on such investments shall be applied in payment of the inter-
355 est accruing on the bonds of this company.

Article Sixth. The said lands thus granted as aforesaid, except 120 sections transferred to Valentine Winters, and except the portion of the said lands acquired and used, or that may now or hereafter be required to be occupied and used for the roadway, depots and other purposes incident and convenient to the proper working of said road, shall be carefully valued and appraised by the

said party of the first part, its officers or agents in divisions and parcels, as may seem to them most expedient for effecting a sale thereof, which allotments and valuations shall be made in writing from time to time as may be found convenient and practicable, and shall be subject to the approval of the trustees, and upon such approval a duplicate thereof shall be deposited with each of the trustees, and also with the treasurer of the party of the first part; which said allotments and valuations may be varied and changed from time to time by the party of the first part, as the value of the lands may be enhanced or depreciated, subject to approval and deposit as aforesaid.

Article Seventh. The party of the first part shall at all times be at liberty to contract for the sale of any parcel or parcels of said land at such prices as to it shall appear fair and reasonable, and such sale or sales may be for cash or on credit, or partly for cash and partly on credit; any of the bonds aforesaid shall be received, at the par
356 value thereof, as cash after providing for the payment of principal and interest of all outstanding bonds secured by prior liens.

If such sale or sales shall be made for cash then upon the payment of such cash, or surrender of such bonds to the trustees, the said trustees, or any two of them, shall by proper deeds or instruments, executed by them, or by the duly authorized agent or attorney of the said trustees, grant and convey such parcel or parcels of land to the purchaser or purchasers thereof by full and sufficient deeds. If such sale or sales shall be made on credit, in whole or in part, then the said trustees, or any two of them, shall by proper deeds or instruments executed as aforesaid grant and convey such parcel or parcels of land to the purchaser or purchasers thereof, and shall receive from such purchaser or purchasers his or their note or notes, bond or bonds, or other instrument in writing for the part of such price then unpaid, and shall hold the same and all moneys received therefrom upon the trusts herein mentioned. And in either case the said deeds shall invest said purchasers with the complete title free and clear of all incumbrances on account of the issue of the bonds secured by this instrument, and shall include as well the title of the company as of the trustees aforesaid.

Article Eight. The trustees shall have full power from time to time to employ such clerks and assistants as they shall find necessary to enable them to discharge properly the duties devolving upon them, under the provisions of this instrument in respect to the sale
357 or conveyance of the land granted as aforesaid by the government of the United States; and they shall also have power to appoint an agent or attorney to execute conveyances of said lands, and to act generally in their behalf in respect thereto, and from time to time to remove such agent and appoint another in his place; and all conveyances executed by such agent or attorney and other acts performed within the scope of his power shall be legal and valid in the same manner as if executed or done by the trustees.

Article Ninth. Conveyances of the said lands granted by the United States may be from time to time, and at all times, executed

by any two of the trustees, or under their authority by an agent appointed as provided in article eighth, and being so executed shall be effectual to divest the title of all the trustees, but in respect to any conveyances so made or the lands embraced therein, or the proceeds of the sale thereof, the trustee not joining shall be in no manner answerable.

Article Tenth. In case default shall be made in the payment of any interest on any of the aforesaid bonds secured by this instrument, issued or to be issued according to the tenor of the coupons thereto annexed, or in any requirement to be done or kept by the party of the first part, and if such default shall continue for the period of six months, it shall be lawful for the said trustees or the survivors or survivor of them, or their or his successors, personally or by their or his attorneys or agents, to enter into and upon all and singular the premises hereby conveyed or intended so to be,
358 and each and every part thereof, and to have, hold and use the same, operating by their or his superintendents, managers, receivers or servants, or other attorneys or agents, the said railway, and conducting the business thereof and making from time to time all repairs and replacements and such useful alterations, additions and improvements thereto as may seem to them or him to be judicious, and to collect and receive all tolls, freights, incomes, rents, issues and profits of the same, and of every part thereof, and after deducting expenses of operating the said railway, and conducting its business, and of all the said repairs, replacements, alterations, additions and improvements, and all payments which may be made for taxes, assessments, charges or liens, prior to the lien of these presents upon the said premises, or any part thereof, as well as a just compensation for their or his own services, to apply the moneys arising as aforesaid to the payment of interest in the order in which such interest shall have become or shall become due ratably to the persons holding the coupons, evidencing the right to such interest, and after paying all the interest which shall have become due to apply the same to the satisfaction of the principal of the aforesaid bonds which may be at that time unpaid, ratably and without discrimination or preference.

Article Eleventh. In case default shall be made as aforesaid, and shall continue as aforesaid, it shall likewise be lawful for the said trustees, or the survivors or survivor of them, or their or his successors after entry as aforesaid, or other entry, or without
359 entry, personally or by their or his attorney or agents, to sell and dispose of all and singular the premises hereby conveyed, or intended so to be, or only so much or such parts thereof as they shall deem necessary and proper with a due regard to the interest of all parties, at public auction, in the city of New York, or at such place within the state of Minnesota as the said trustees may designate, and at such time as they may appoint, having first given notice of the place and the time of such sale by advertisement published not less than three times a week for four months, or such shorter time, not less than forty days, as the party of the first part may by reso-

lution of its board of directors assent to, in one or more newspapers in the cities of New York and St. Paul, or to adjourn the said sale from time to time, in their or his discretion, and if so adjourning to make the same at the time and place to which the same may be so adjourned; and on receiving a full payment for the same to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds in the law for the same, in fee simple, which sale made as aforesaid, shall be a perpetual bar, both in law and equity, against the party of the first part, and all other persons lawfully claiming or to claim the said premises or any part thereof, by, from, through or under it; and after deducting from the proceeds of such sale just allowances for all the expenses for the said sale, including the attorney's and counsel fees, and all other expenses, advances or liabilities which may have been made or incurred by the
360 said trustees in operating or maintaining the said railway, or in managing its business while in possession, and all payments which may have been made by them for taxes and assessments, and for charges and liens prior to the lien of these presents on the said premises, or any part thereof, as well as compensation for their own services, to apply the said proceeds to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall have previously become due, and of the interest which shall have previously become due, and of the interest which shall at that time have accrued on the said principal and be unpaid, without discrimination or preference, but ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest, and if after satisfaction thereof, a surplus of the said proceeds shall remain, to pay over the same to the said First Division of the St. Paul and Pacific Railroad Company, or to such other parties as may be entitled to receive the same.

And it is hereby declared that the receipt or the receipts of the said trustees shall be a sufficient discharge to the purchaser or purchasers of the premises, or of any part thereof, for his or their purchase money, and that such purchaser or purchasers, his or their heirs, executors or administrators, shall not after payment thereof, and having such receipts be liable to see to its being applied upon, or for the trusts and purposes of these presents or in any manner whatsoever be answerable for any loss, misapplication or non-application
361 of such purchase money, or any part thereof, or be obliged to inquire into the necessity, expediency or authority of or for any such sale.

Article Twelfth. At any sale of the aforesaid railroad, equipments and appurtenances, or any part thereof, whether made by virtue of the power herein granted or by judicial authority, the trustees may bid for and purchase, or cause to be bid for and purchased, the property so sold, or any part thereof, in behalf of all the holders of the bonds secured by this instrument and then outstanding, in the proportion of the respective interest of such bondholders at a reasonable price, if but a portion of the said property shall be sold

or if all of it be sold at a price not exceeding the whole amount of such bonds outstanding, with the interest accrued thereon.

Article Thirteenth. In case default shall be made in the payment of any half year's interest on any of the aforesaid bonds, at the time and in the manner in the coupon issued therewith provided, the said coupon having been presented, and the payment of the interest thereon specified having been demanded, and that such default shall continue for the period of six months after the said coupon shall have become due, then and in that case the principal of all the bonds secured hereby shall at the election of the trustees become immediately due and payable, anything contained in said bonds or herein to the contrary notwithstanding; but a majority in interest of the holders of the said bonds may in writing or by a vote
362 of a meeting duly held instruct the trustees to declare the said principal to be due, or to waive the right so to declare on such terms and conditions as such majority shall deem proper, or may annul or reverse the election of the trustees, provided that no action of the trustees or bondholders shall extend to or be taken to effect any subsequent default or to impair the rights resulting therefrom. Meetings of the holders of bonds secured by this instrument may be called by the trustees or in such other mode as may be fixed by regulations prescribed or established as hereinafter provided, and the bondholders may vote thereat in person or by proxy; and the quorum may be defined and such other regulations or by-laws in respect to such meetings may be from time to time established, altered or repealed by the bondholders, acting by a majority in interest, as to them shall seem expedient; and until the bondholders shall act, such powers may be temporarily exercised by the trustees. The trustees shall have a right to require at their option that any act or resolution of the said bondholders affecting their duties or the interest of the trust hereby created shall be authenticated by the signatures of all the persons assenting thereto, as well as by a minute of the proceedings of the meeting.

Article Fourteenth. The party of the first part shall from time to time, and at all times hereafter, and as often as thereunto requested by the trustees, execute, deliver and acknowldge all such further deeds, conveyances and assurances in the law, for the better securing unto the trustees and their successors in the trust hereby
363 created upon the trust herein expressed, the lands, railway, equipment, and appurtenances hereinbefore mentioned, or intended so to be, and all other property and things whatsoever which may be hereafter acquired for use in connection with the same, or any part thereof; and all franchises now held or hereafter acquired, including the franchise to be a corporation, as by the trustees or the survivors or survivor of them, or their successors, or by their or his counsel learned in the law, shall be reasonably advised, devised or required; and the party of the first part shall furnish to the parties of the second part from time to time, upon their reasonable request in writing, a true and full inventory of all the movable property appertaining to the said railroad, and the operation thereof, which is transferred or agreed to be transferred by this indenture;

but no default to demand or to furnish such inventory shall impair the operation or effect of this indenture upon all or any of the property herein agreed to be transferred.

Article Fifteenth. The trustees shall have full power, in their discretion and upon the written request of the party of the first part, to convey, by way of release or otherwise, to the persons designated by the said party of the first part, the whole or any part of any lands acquired or held for the purposes of stations, depots, shops and other buildings, or the uses connected therewith; and shall also have power to convey as aforesaid any lands, whether donated by
364 the United States government or otherwise, which in the judgment of the trustees shall not be necessary for use in connection with the said railroad, or which may have been held for a supply of fuel, gravel or other material; and also to convey as aforesaid any lands which may have become disused by reason of a change of the location of any station house, depot, shops or other building connected with the said railway, and such lands occupied by the track and adjacent to such station house, depot, shop or other building as the said party may deem it expedient to disuse or abandon by reason of such change, and to consent to any such change, and to such other changes in the location of the track as in their judgment shall have become expedient, and to make and deliver the conveyances necessary to carry the same into effect; but any lands which may be acquired for permanent use in substitution of any so released shall be conveyed to the trustees upon the trust of these presents; and the trustees shall also have full power to allow the said party of the first part, from time to time, to dispose of, according to its discretion, such portions of the equipments, machinery and implements at any time held or acquired for the use of the said railway as may have become unfit for such use, replacing the same by new, which shall be conveyed to the trustees, or be otherwise made subject to the operation of these presents.

Article Sixteenth. If the party of the first part shall well and truly pay the sums of money herein required to be paid by the
365 said party, and all interest thereon, at the times and in the manner herein specified, and shall well and truly keep and perform all the things herein required to be kept or performed by the said party, according to the true intent and meaning of these presents then, and in that case, the estate, right, title and interest of the said parties of the second part, and of their successors in the trust hereby created shall cease, determine and become void; otherwise the same shall be and remain in full force and virtue.

Article Seventeenth. It is hereby declared and agreed that it shall be the duty of the trustees to exercise the power of entry hereby granted, or the power of sale hereby granted, or both, or to take appropriate legal proceedings to enforce the rights of the bondholders under these presents, upon the requisition in writing as hereinafter specified, as applicable to the several cases of default in the manner and subject to the qualifications hereinafter provided, as follows:

1. If the default be as to the principal or interest of any bonds provided for by these presents, such requisition upon the said trustees shall be by holders of not less than two hundred and fifty thousand dollars in aggregate amount of the said bonds; and upon such requisition and a proper indemnification by the persons making the same to the trustees against the cost and expenses, to be by them incurred, it shall be the duty of the trustees to enforce the rights of bondholders under these presents by entry, sale or legal proceedings as they, being advised by counsel learned in the law,
366 shall deem most expedient for the interest of all the holders of said bonds.

2. If the default be in the omission of any act or thing required by Article Fourteenth of these presents for the further assuring of the title of the trustees to any property or franchises now possessed or hereafter acquired or in any provision herein contained to be performed or kept by the said company, then and in either of such cases, the requisition shall be as aforesaid, but it shall be within the discretion of the trustees to enforce or waive the rights of the bondholders by reason of such default, subject to the power hereby declared of a majority in the interest of the holders of the said bonds by the requisition in writing or by vote at a meeting duly held to instruct the said trustees to waive such default or to enforce their rights by reason thereof, provided that no action of the said trustees or bondholders, or both, in waiving such default or otherwise shall extend to or be taken to affect any subsequent default or to impair the rights resulting therefrom.

Article Eighteenth. It is mutually agreed by and between the parties hereto that the word "trustees," as used in these presents, shall be construed to mean the trustees for the time being, whether all or any be original or new; and whenever a vacancy shall exist to mean the surviving or continuing trustees or trustee; and such trustee or trustees shall, during such vacancy, be competent to exercise all the powers granted by these presents to the parties
367 of the second part. And it is mutually agreed by and between the parties hereto as a condition on which the parties of the second part have assented to these presents, that the said trustees shall not be in any manner responsible for any act, default or misconduct of each other, nor for any default or misconduct of agents by them employed, nor shall either of them be answerable, except for his own willful default or misconduct; that the said trustees shall be entitled to just compensation for all services which they may hereafter render in their trust, to be paid by the said company; that either of the said trustees, or any successor may resign and discharge himself of the trust created by these presents by notice in writing to The First Division of the St. Paul and Pacific Railroad Company and to the existing trustee or trustees, if there be such, three months before such resignation shall take effect, or such shorter time as they or he may accept as adequate notice, and upon the due execution of the conveyances herein required; that the said trustees or any or either of them may be removed by the vote

of a majority in interest of the holders of the aforesaid bonds, the said vote being had at a meeting duly held of the said bondholders, and attested by an instrument, under the hands and seals of the persons so voting; that in case at any time hereafter either of the said trustees or any trustee hereafter appointed shall die, or resign, or be removed as herein provided, or by a court of competent jurisdiction, or shall become incapable or unfit to act in the said trust, a successor to such trustee shall be appointed by the surviving or continu-
368 uing trustees or trustee, with the consent of the holders for the time being, of a majority in interest of the said bonds then outstanding, or the consent of a meeting duly held of the holders of said bonds; and the trustee so appointed with the trustees or trustee so surviving or continuing, shall thereupon become vested with all the powers, authorities and estates granted to or conferred upon the parties of the second part by these presents, and all the rights and interests, requisite to enable him to execute the purposes of this trust, without any further assurance or conveyance, as far as such effect may be lawful; but the surviving or continuing trustees or trustee shall immediately execute all such conveyances and other instruments as may be fit or expedient for the purpose of assuring the legal estate in the premises jointly with themselves or himself, to the trustee so appointed; and upon the death, resignation or removal of any trustee, or any appointment in his place, in pursuance of these presents, all his powers and authorities by virtue thereof shall cease; and all the estate, right, title and interest in the said premises of any trustee so dying, resigning or being removed shall, if there be a co-trustee or co-trustees surviving or continuing in office, wholly cease and determine; but the said trustee so resigning or being removed shall, on the written request of the new trustee, who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new trustee jointly with the continuing trustees or trustee, and upon the trust herein expressed, all
369 the property, rights and franchises which may be at that time held upon the said trusts. And in case it shall at any time hereafter prove impracticable, after reasonable exertions, to appoint in the manner hereinbefore provided, a successor in any vacancy which may have happened in said trust, application in behalf of all the holders of the bonds secured hereby may be made by the surviving or continuing trustees or trustee; or, if the trust be wholly vacant, by holders of the said bonds to the aggregate amount of one hundred thousand dollars to any circuit court of the United States for any judicial district in which any part of the aforesaid railway may be situate, for the appointment of a new trustee or new trustees. Provided, however, that at least one of the said trustees shall always be a citizen of the state of Minnesota.

In witness whereof, the party of the first part has caused its corporate seal to be hereunto affixed, and the same to be attested by the signature of its president and secretary; and the parties of the second part have hereunto set their hands and seals to testify their

370 acceptance of the trust hereby created, the day and year first above written.

THE FIRST DIVISION OF THE ST. PAUL AND PACIFIC RAILROAD COMPANY,
By GEO. L. BECKER, *President.*

[L. S.]

Attest: SAMUEL S. BREED, *Secretary.*

GEORGE L. BECKER. [L. S.]
HORACE THOMPSON. [L. S.]
GEO. T. M. DAVIS. [L. S.]

In the presence of, as to signatures of Geo. L. Becker, President,
GEO. L. BECKER AND
HORACE THOMPSON.

As to Geo. T. M. Davis:
EDMUND D. ATWATER.
HERMAN TROTT.
CHARLES NETTLETON.
W. SAVAGE.

(uly acknowledged.)
(Duly certified by the Secretary of State of Minnesota.)

DEFENDANT'S EXHIBIT 27.

The St. Paul, Minneapolis and Manitoba Railway Company.

Whereas, in and by a certain judgment and decree made and entered on the 15th day of March, 1879, in a certain action pending in the District Court for the Second Judicial District, in the County of Ramsey and State of Minnesota, wherein Horace Thompson and John S. Kennedy, trustees, are plaintiffs, and The Saint Paul and Pacific Railroad Company, The First Division of the Saint Paul and Pacific Railroad Company, Geo. L. Becker, Wm. G. Moorhead, trustees, Henry T. Welles, Greenleaf Clark and Edwin C. Litchfield, trustees, Martin Farrant and Peter S. Le Claire, John D. Gray, Augustus Mooers, Charles Haywood, James Cartledge and Frank L. Honore, Lewis Baker and The Saint Anthony Iron Works are defendants, and which said action was brought to foreclose a certain mortgage or deed of trust, bearing date the 1st day of October, 1865, executed by said defendant the First Division of the Saint Paul and Pacific Railroad Company, to the plaintiff Horace Thompson, the defendant Geo. L. Becker and one George T. M. Davis, as trustees, upon all and singular certain property, premises, rights immunities and franchises in said judgment and decree specified and hereinafter described, to secure certain mortgage bonds issued and negotiated by said defendant the First Division of the Saint Paul and Pacific Railroad Company, being even date with said mortgage or deed of trust, to the aggregate amount of $1,134,000, as found and adjudged in and by the said judgment and decree, and for a more full description of which said

371

mortgage or deed of trust, reference is hereby made to said judgment and decree, and to the complaint in said action, it was among other things adjudged and decreed that all and singular the said property, premises, rights, immunities and franchises so described in
372 and covered by the said mortgage or deed of trust, be sold at public auction by and under the direction of the sheriff of the county of Ramsey and State of Minnesota, at the front door of the old court house, in the city of Saint Paul, in said county of Ramsey, subject, however, as to the ten miles of the railroad covered by said mortgage, from Saint Paul to Saint Anthony, to the prior lien of that certain mortgage, dated March 11, 1862, for $120,000, to which last named mortgage reference is made in said judgment and decree, and subject also as to said railroad from Saint Paul to Watab to the prior lien of that certain mortgage dated June 2nd 1862, for $700,000, to which last named mortgage reference is also made in said judgment and decree and subject also as to said railroad from St. Paul to Watab and as to all and singular the tracts, sections and parcels of land had, granted to or acquired by said defendants "The First Division of the Saint Paul and Pacific Railroad Company," and the "St. Paul and Pacific Railroad Company," or either of them, appertaining to the said line of railroad by virtue of the congressional grant, approved March 3rd, 1857, and legislative enactments of the State of Minnesota, named in the complaint in said action, to the lien of a certain mortgage dated June 2nd, 1862, for the sum of $1,200,000, to which last named mortgage reference is also made in said judgment and decree; saving and excepting from such sale all such pieces, parcels and tracts of land as had, prior to the said judgment and decree been granted and con-
373 veyed by the trustees in the said mortgage of October 1st, 1865, in pursuance of the terms and provisions of said last named mortgage; and also saving and excepting the lands conveyed to one Valentine Winters by a certain deed, dated June 30th, 1862, to which deed and lands reference is also made in said judgment and decree; that the same be sold in one parcel and as one entire property to the highest and best bidder, that the said sheriff should give public notice of the time and place of such sale, according to law and the course and practice of said court, and make report thereof to the court, and that upon the payment of the purchase money as in said judgment and decree provided, and the confirmation of such sale by the court, the said sheriff should execute and deliver a proper certificate or conveyance of the premises to the purchaser or purchasers thereof, and all the right, title, interest and equity of re-emption of the said railroad companies, and of each of them, in and to the same.

And, whereas, a transcript of said judgment and decree, duly certified by the clerk of said court, was, on the 22nd day of March, 1879, duly delivered to me the undersigned James King, sheriff of said county of Ramsey, by the plaintiffs in said action, under and by virtue of which I, as such sheriff, did give due and legal public notice of the sale of said premises, as provided in the said judgment and decree, and in pursuance of the statute in such case made and

provided by causing a notice containing the specifications required by law, and setting forth the terms and conditions of sale
374 embodied in said judgment and decree, and referring in proper terms of the limitations, conditions, savings and exceptions in said judgment and decree provided, and stating that the said premises would be sold at public auction, to the highest and best bidder, at the front door of the old court house, in the city of Saint Paul, in said county of Ramsey, on the 7th day of May, 1879, at ten o'clock in the forenoon of that day, by the sheriff of said county of Ramsey, to be posted for six weeks successively in three public places in said Ramsey county, where a portion of said mortgaged premises and property is situated, and by causing a copy of said notice to be published once a week for the same period of six weeks successively in a newspaper printed and published daily in the city of Saint Paul, in said county of Ramsey, called "The Pioneer Press."

And, whereas, all and singular the said property and premises so advertised for sale and hereinafter specifically described were, pursuant to said notice, and at the time and place therein specified, to-wit: on the 7th day of May, 1879, at ten o'clock in the forenoon, at the front door of the old court house, in the city of Saint Paul, in said county of Ramsey, by me duly struck off and sold as one entire property and in one parcel to John S. Barnes, of Elizabeth, in the State of New Jersey, for the benefit of himself and George Stephen, Donald A. Smith, Norman W. Kittson and James J. Hill, for the sum of two hundred thousand dollars, he being the highest best bidder, and that being the highest sum bidden for the same;
375 to all of which facts and matters hereinabove recited I do hereby certify.

And, whereas, I have duly made report of said sale, and of all proceedings thereon, to said court, as required by said judgment and decree, and which said report has been in all things duly confirmed by the court, whereby the said purchasers have become entitled to a proper certificate or conveyance of the said property and premises, as in said judgment and decree provided;

Now, therefore, these presents witness, that I, the said James King, sheriff of said county of Ramsey, by virtue of the authority in me vested as such sheriff, and of the said judgment, and of the statute in such case made and provided, in consideration of the premises hereinbefore recited, and of the said sum of two hundred thousand dollars to me in hand paid by the said John S. Barnes, the receipt whereof is hereby acknowledged, have struck off and sold as aforesaid, and do hereby grant and convey unto the said John S. Barnes, for the benefit of himself and the said George Stephen, Donald A. Smith, Norman W. Kittson and James J. Hill, all and singular the said property and franchises so struck off and sold to him as aforesaid, to-wit:

The line of railroad of said defendant corporation, The First Division of the Saint Paul and Pacific Railroad Company, commonly known as its Branch Line, extending from the city of Saint Paul, aforesaid, northwardly by way of St. Anthony and Anoka, to Watab, on the Mississippi river, in the county of Benton, in the State of

Minnesota, together with all and singular the railways, ways
376 and rights of way, depot grounds and other lands, all tracks, bridges, viaducts, culverts, fences and other structures, all depots, station houses, engine houses, car houses, freight houses, wood houses, and other buildings, and all machine shops and other shops, all locomotives, tenders, cars and other rolling stock or equipments, and all machinery, tools, implements, fuel and materials for the constructing, operating, repairing or replacing the said railway, also all franchises connected with or relating to the said railway or the construction, maintenance or use thereof, and all corporate franchises, including the franchise to be a corporation, and all other property of the said corporation, The First Division of the Saint Paul and Pacific Railroad Company, appertaining to the said line of railroad, real, personal or mixed, whether owned on the first day of October, 1865, the date of the mortgage foreclosed in the said action, or afterwards acquired together with all and singular the land grants, tracts, sections and parcels of land, had, granted to or acquired by said defendant corporation, The First Division of the Saint Paul and Pacific Railroad Company, appertaining to the said line of railroad, under or by virtue of the congressional grants, approved March 3rd, 1857 and March 3rd, 1865, and the legislative acts of the State of Minnesota, in the complaint in said action named, together with all and singular the endowments, income and advantages, tenements, hereditaments and appurtenances to said lands, railroad and property belonging, or in any way appertaining, and the reversion
377 and reversions, remainder and remainders, tolls, income, rents, issues and profits thereof, saving and excepting, however all such pieces, parcels and tracts of land as had, prior to the date of said judgment and decree, been granted and conveyed by the trustees in the said mortgage of October 1st, 1865, pursuant to the terms and provisions thereof; and also saving and excepting the lands conveyed to one Valentine Winters, by a certain deed, dated June 30th, 1862, to which deed and lands reference is also made in said judgment and decree; also subject as to the ten miles of the said railroad from Saint Paul to Saint Anthony, to the prior lien of the said mortgage, dated March 11th, 1862, to Walter L. Cutting, trustee, for $120,000, and as to the said railroad from Saint Paul to Watab, to the prior lien of said mortgage, dated June 2nd, 1862, to Russell Sage and Samuel J. Tilden, trustees, for $700,000, and as to the said railroad from Saint Paul to Watab, and as to all and singular the tracts, sections and parcels of land embraced within the said congressional grant of March 3rd, 1857, to the lien of said mortgage, dated June 2nd, 1862, to Edmund Rice, Horace Thompson and Samuel J. Tilden, trustees, for $1,200,000, and subject also to the terms, conditions, provisions, savings and exceptions in the said judgment and decree specified and mentioned, to which, for greater certainty, reference is hereby made.

To have and to hold the above granted premises, with all and singular the tenements, hereditaments and appurtenances
378 thereto belonging, unto the said John S. Barnes, for the benefit of himself and the said George Stephen, Donald A.

Smith, Norman W. Kittson and James J. Hill aforesaid, and to his and their assigns forever.

In testimony whereof as such sheriff, I have hereunto set my hand and affixed my seal this 10th day of May, A. D. 1879.

JAMES KING. [SEAL.]
Sheriff of Ramsey County, Minnesota.

Signed, sealed and delivered in presence of
H. R. BIGELOW.
GEO. L. OTIS.
(Duly verified.)

DEFENDANT'S EXHIBIT 28.

Statement of the St. Paul, Minneapolis and Manitoba Railway Company,

made, certified and attested under and pursuant to an act of the legislature of the state of Minnesota, approved March 6th, A. D. 1876, entitled "An act to amend Title 1, of Chapter 34, of the General Statutes, relating to corporations."

Whereas, in pursuance of a judgment and decree of the district court of the Second judicial district of the state of Minnesota, in and for the county of Ramsey, made and entered on the fifteenth day of March, A. D. eighteen hundred and seventy-nine, in a certain action pending in said court, wherein Horace Thompson and
379 John S. Kennedy, trustees, are plaintiffs, and the First Division of the Saint Paul and Pacific Railway Company and others are defendants, which action was brought for the foreclosure of that certain deed of trust or mortgage of the said First Division of the Saint Paul and Pacific Railroad Company, bearing date the first day of October, A. D. eighteen hundred and sixty-five, and generally known and described as its $2,800,000 Branch Line Mortgage, the sheriff of the said county of Ramsey did, on the seventh day of May, A. D. eighteen hundred and seventy-nine, at the city of Saint Paul, in said county, sell at public auction all and singular the rights, franchises, land grants, lands and other property covered by the said mortgage, viz.: the line of railroad of said first division of the Saint Paul and Pacific Railroad Company, commonly known as its Branch Line, extending from the city of St. Paul aforesaid northwardly, by way of St. Anthony and Anoka, to Watab, in said state, together with all and singular the railways, ways and rights of way, depot grounds, and other lands, all tracks, bridges, viaducts, culverts, fences and other structures, all depots, station houses, engine houses, car houses, freight houses, wood houses and other buildings, and all machine shops and other shops, all locomotives, tenders, cars and other rollling stock or equipments, and all machinery, tools, implements, fuel and materials for the constructing, operating, repairing or replacing the said railway, and all franchises connected with or relating to the said railway, or the construction, mainte-

nance or use thereof, including the franchise to be a corpo-
380 ration, and all other property of the said First Division of the Saint Paul and Pacific Railroad Company, appertaining to the said line of railroad, real, personal or mixed, together with all and singular the land grants, tracks, sections and parcels of land had, granted to or acquired by said first division of the Saint Paul and Pacific Railroad Company, appertaining to the said line of railroad, under or by virtue of the congressional grants, approved March 3rd, 1857, and March 3rd, 1865, and the legislative acts of the state of Minnesota in said judgment as well as in said mortgage referred to, and all and singular the endowments, incomes and advantages, tenements, hereditaments and appurtenances to said lands, railroad and property belonging, or in any way appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof, subject, however, to certain exceptions and prior liens in said mortgage mentioned, as well as to certain provisions, savings and exceptions in said judgment contained, at which sale the entire railroad, rights, franchises, land grants and lands, and other property, so sold, were purchased by John S. Barnes, for the benefit of himself, George Stephen, Donald A. Smith, Norman W. Kittson and James J. Hill, with a view to the forming of a new organization and corporation pursuant to the statutes in such case made and provided.

And, whereas, the said sheriff afterwards, and on the tenth day of said May, upon the confirmation of the said sale by the said
381 court, did duly execute and deliver to the said Barnes, for the benefit of himself and the said Stephen, Smith, Kittson and Hill, as aforesaid, a certificate of such sale, or conveyance thereunder, as authorized and required in and by the said judgment and decree; to which mortgage, and the record thereof in the office of the secretary of state of the state of Minnesota, as well as to the said judgment and decree, and the said certificate of sale or conveyance, and to each of them, reference is hereby made for the full contents and legal effects thereof.

And, whereas, the said persons for whose benefit the said purchase was so made as aforesaid, did thereupon proceed to organize as authorized in such cases and at a meeting duly held for that purpose at the said city of St. Paul, on the twenty-third day of May, A. D. eighteen hundred and seventy-nine, pursuant to notice first duly given at which meeting the said John S. Barnes, George Stephen, Donald A. Smith, Norman W. Kittson and James J. Hill were each and all of them present, and acting in person, did adopt for the proposed new organization a corporate name, to-wit, The Saint Paul, Minneapolis and Manitoba Railway Company, and did elect for such organization a board of seven directors, which said board thereupon and on the same day elected a president, vice president, secretary and treasurer, and adopted a corporate seal, whereby the said organization became complete, and a body corporate under the name so adopted as aforesaid, and clothed as such with all and singu-
382 lar the rights, powers, privileges, franchises, immunities and advantages which were held or possessed at the time of the

execution of the said mortgage, or afterwards acquired by the said first division of the Saint Paul and Pacific Railroad Company, so far as applicable to the said road and property, and to the management, use and enjoyment thereof, and became the owner of said road and property, subject only to the prior liens hereinbefore referred to, and the provisions, savings and exceptions in the said judgment contained.

Now, therefore, this statement witnesseth, to all whom it may concern:

First. That such organization was formed on the twenty-third day of May, A. D. one thousand eight hundred and seventy-nine.

Second. That the corporate name by it adopted was and is, "The Saint Paul, Minneapolis and Manitoba Railway Company."

Third. That the amount of its capital stock is fifteen million dollars, divided into shares of one hundred dollars each, and all common stock; of which capital stock two million dollars (twenty thousand shares) has been issued, and thirteen million dollars (one hundred and thirty thousand shares) thereof is, as yet, unissued.

Fourth. That the names of its officers are as follows: President, George Stephen; Vice President, Norman W. Kittson; Secretary, Edward Sawyer; Treasurer, Edward Sawyer; all of whom were elected as hereinabove stated by said board of directors, and the company has no other general officers.

383 Fifth. That the number of its directors so chosen at said meeting for organization is seven, that the names of such directors are George Stephen, Donald A. Smith, Norman W. Kittson, James J. Hill, John S. Barnes, Ruben B. Galusha and Horace R. Bigelow, and that the same persons still constitute the board of directors of the company.

Sixth. That the corporate seal affixed to these presents is that adopted at said meeting for organization as hereinabove stated.

In testimony whereof, the said company has caused these presents to be certified under its corporate seal hereto affixed, and the same to be attested by its president and secretary.

Dated this eleventh day of June, A. D. one thousand eight hundred and seventy-nine.

GEORGE STEPHEN,
President of the St. Paul, Minneapolis and Manitoba Railway Company.
EDWARD SAWYER,
Secretary of the St. Paul, Minneapolis and Manitoba Railway Company.

[CORPORATE SEAL.]

(Duly acknowledged.)
(Duly certified by the Secretary of State of Minnesota.)

384 DEFENDANT'S EXHIBIT 29.

Whereas, in pursuance of a judgment and decree of the District Court of the Second Judicial District of the State of Minnesota, in and for the County of Ramsey, made and entered on the fifteenth day of March, A. D. one thousand eight hundred and seventy-nine, in a certain action pending in said court wherein Horace Thompson and John S. Kennedy, trustees, are plaintiffs, and The First Division of the Saint Paul and Pacific Railroad Company and others are defendants, which actions were brought for the foreclosure of that certain deed of trust or mortgage of the said company, bearing date the first day of October, A. D. eighteen hundred and sixty-five, and generally known and described as its $2,800,000 Branch Line Mortgage, the sheriff of the said County of Ramsey did, on the seventh day of May, A. D. eighteen hundred and seventy-nine, at the City of Saint Paul, in said county, sell at public auction all and singular the rights, franchises, land grants, lands and other property covered by the said mortgage, viz.: the line of railroad of said First Division of the Saint Paul and Pacific Railroad Company commonly known as its branch line, extending from the City of Saint Paul, aforesaid, northwardly by way of Saint Anthony and Anoka to Watab, in said state, together with all and singular the railways ways and rights of way, depot grounds and other lands, all tracks, bridges, viaducts, culverts, fences and other structures, all
385 depots, station houses, engine houses, car houses, freight houses, wood houses and other buildings, and all machine shops and other shops, all locomotives, tenders, cars and other rolling stock and equipments, all machinery, tools, implements, fuel and materials for the constructing, operating, repairing or replacing the said railway, and all franchises connected with or relating to the said railway, or the construction, maintenance or use thereof, including the franchise to be a corporation, and all other property of the said First Division of the Saint Paul and Pacific Railroad Company appertaining to the said line of railroad, real, personal or mixed, and including all and singular the land grants, tracts, sections and parcels of land had, granted to or acquired by the said First Division of the Saint Paul and Pacific Railroad Company appertaining to the said line of railroad, under or by virtue of the congressional grants of March 3d, 1857, and March 3d, 1865, and the legislative acts of the State of Minnesota, in said judgment as well as in said mortgage referred to, and all and singular the endowments named and advantages, tenements, hereditaments and appurtenances to the said lands, railroad and property belonging or in any way appertaining and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof, subject, however, to certain exceptions and prior liens in said mortgage mentioned, as well as to certain provisions, savings and exceptions in said judgment contained, at which sale the entire railroad, rights, franchises,
386 land grants, lands and other property so sold, were purchased by John S. Barnes, for the benefit of himself, George Stephen,

Donald A. Smith, Norman W. Kittson and James J. Hill, with a view to the forming of a new organization and corporation pursuant to the statute in such case made and provided;

And, whereas, the said sheriff afterwards, and on the tenth day of said May, upon the confirmation of the said sale by the said court, did duly execute and deliver to the said Barnes, for the benefit of himself and the said Stephen, Smith, Kittson and Hill as aforesaid, a certificate of such sale, or conveyance thereunder, as authorized and required in and by the said judgment and decree, to which mortgage and the record thereof in the office of the Secretary of State of the State of Minnesota, as well as to the said judgment and decree, and the said certificate of sale or conveyance, and to each of them reference is hereby made for the full contents and legal effect thereof.

And, whereas, the said persons for whose benefit the said purchase was so made as aforesaid, did thereupon proceed to organize, and did in fact organize, a corporation pursuant to the statutes aforesaid, and such organization was completed and became a corporation, having for its corporate name "The Saint Paul, Minneapolis and Manitoba Railway Company," on the twenty-third day of May, A. D. eighteen hundred and seventy-nine, as is more fully set forth in a certain paper writing made and certified by the company so organized under its corporate seal, and attested by its Presi-
387 dent and Secretary, bearing date June eleventh, A. D. eighteen hundred and seventy-nine, showing, among other things, the date of such organization, the corporate name by it adopted, the amount of its capital stock, issued and unissued, the names of its President, Vice President, Secretary and Treasurer, and the number and names of its directors, which said paper writing was acknowledged, proved or bonafied, by the said President and Secretary, before George C. Squires, a notary public in and for the County of Ramsey, and State of Minnesota, on the 14th day of said June, and has been, or is to be, recorded in the office of the Secretary of State of said State of Minnesota, and the same is hereby referred to and made part hereof as if here repeated in full.

Now, therefore, we, the said John S. Barnes, George Stephen, Donald A. Smith, Norman W. Kittson and James J. Hill do hereby certify and declare, to whom it may concern, that all and singular the statements made and recitals contained in said paper writing are true in fact, and that said The Saint Paul, Minneapolis and Manitoba Railway Company so as in fact formed and organized, as in said paper writing stated, and thereby became, or was intended to be, a corporation vested with and possessed of not only the rights, powers, privileges, franchises, immunities and advantages, but also the said line of railroad and all and singular the land grants, land and other property embraced in the said purchase so made by
388 us, or for our benefit as aforesaid. And in consideration of the premises, we and each of us do hereby quitclaim and relinquish unto the said organization, The Saint Paul, Minneapolis and Manitoba Railway Company, its successors and assigns forever, any and all right, title, interest and estate which we or any of us

have or may be entitled to in or to the said line of railroad, lands, land grants and other property, or any part thereof, under or by virtue of the purchase aforesaid.

In testimony whereof, we have hereunto set our hands and seals this eighteenth day of June, A. D. one thousand eight hundred and seventy-nine.

GEO. STEVENS. [SEAL.]
DON. A. SMITH. [SEAL.]
NORMAN W. KITTSON. [SEAL.]
JAS. J. HILL. [SEAL.]
JOHN S. BARNES. [SEAL.]

Signed, sealed and delivered in presence of
GEO. C. SQUIRES.
H. R. BIGELOW.

By all except John S. Barnes.

Signed, sealed and delivered by John S. Barnes, in presence of
H. M. MOXIE.
F. H. HERRICK.

(Duly acknowledged.)
(Duly certified by the Secretary of State of Minnesota.)

389 DEFENDANT'S EXHIBIT 30.

This indenture, made this first day of July, in the year of our Lord one thousand eight hundred and sixty-eight, between the First Division of the Saint Paul and Pacific Railroad Company, a body corporate, created by the acts of the Legislature of the Territory and State of Minnesota, hereinafter referred to, representing the stockholders upon that part of the lines of said company which extends from St. Anthony via Minneapolis to a point between the foot of Big Stone lake and the mouth of Sioux Wood river, and from thence to any point on the Missouri river north of the forty-fifth parallel of north latitude, known as the Main Line, party of the first part, and George L. Becker and Horace Thompson, of the city of Saint Paul and State of Minnesota, and Samuel J. Tilden, of the city and State of New York, parties of the second part,

Witnesseth, whereas, by an act of the Senate and House of Representatives of the United States of America in Congress assembled, approved on the 3rd day of March, in the year of our Lord one thousand eight hundred and fifty-seven, entitled "An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State," there was granted by the United States of America to the late Territory of Min-
390 nesota, for the purpose of aiding in the construction of railroads from and to certain points and places mentioned in said

act (to which act reference is hereby made, for a particular description thereof) every alternate section of land designated by odd numbers for six sections in width on each side of said roads and branches, except in cases where it should appear that the United States had, when the lines or routes of said roads were definitely fixed, sold any of such sections or parts of sections, or that the right of pre-emption had attached to the same; and in such case it was provided by said act of Congress that there should be granted to said territory for the like purposes before mentioned so much land nearest to the tiers of sections above specified in alternate sections or parts of sections as should be equal to such lands as the United States may have sold or otherwise appropriated, or to which the rights of pre-emption may have attached, the same to be selected by any agent or agents to be appointed by the Governor of said Territory or future State of Minnesota, sub- to the approval of the Secretary of the Interior, and to be located not further than fifteen miles from the lines of said railroads or branches; and it being provided by said act that the lands thereby granted for and on account of said roads and branches severally should be exclusively applied in the construction of that road for and on account of which such lands were thereby granted and should be disposed of only as the work progresses;

391 And, whereas, by an act of the Senate and House of Representatives of the United States of America in Congress assembled, approved on the 3rd day of March, in the year of our Lord one thousand eight hundred and sixty-five, entitled "An act extending the time for the completion of certain land grant railroads in the States of Minnesota and Iowa, and for other purposes," the quantity of lands granted to the State of Minnesota to aid in the construction of certain railroads in said state, as indicated in the first section of the act first above recited, approved March 3rd, 1857, should be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act, and subsequent acts (to which act reference is hereby made for particular description thereof);

And, whereas, by an act of the Senate and House of Representatives of the United States of America in Congress assembled, approved on the 13th day of July, in the year of our Lord one thousand eight hundred and sixty-six, entitled "An act relating to lands granted to the State of Minnesota to aid in the construction of railroads" (to which act reference is hereby made for a particular description thereof), the conditions and terms of the previous acts hereinbefore recited were modified and changed.

And, whereas, the Legislative Assembly of the late Territory of Minnesota, by an act approved on the 22nd day of May, in the year of our Lord 1857, entitled "An act to execute the trust created

392 by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama to aid the construction of a certain railroad in said state, and granting certain lands to railroad companies therein named," did create and declare

the persons therein named a body politic and corporate by the name and style of the Minnesota and Pacific Railroad Company, and did authorize and empower the said company to locate, construct, maintain and operate a railroad with one or more tracks or lines or rail on such route as said company should think proper from Stillwater by way of St. Paul and St. Anthony, via Minneapolis, to the town of Breckenridge on the Sioux Wood river, with a branch from St. Anthony via Anoka, St. Cloud and Crow Wing, to St. Vincent, near the mouth of the Pembina river, the said railroad and branch being one of the railroads and branches specially mentioned in and provided for by said act of Congress; and for the purpose of aiding in the construction of the said railroad and branch did grant to said company all the interest and estate, present and prospective, of said territory and of the future state, which should succeed it in or to any or all of the lands granted by the government of the United States to the Territory of Minnesota for the purpose of aiding in the construction of a railroad from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone lake and the
393 mouth of the Sioux Wood river, with a branch, via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North to the point hereinbefore mentioned under and by virtue of the act of Congress, approved on the 3rd day of March, 1857, hereinbefore referred to, together with all and singular the rights, privileges and immunities conferred, or intended to be conferred, by said act of Congress; conditioned that said land should be exclusively applied to the construction of the road hereinbefore described, the title to all which lands was to be vested in said company in various parcels from time to time in accordance with the provisions of said act of the Legislative Assembly of the late Territory of Minnesota, to which provisions reference is hereby made by the party of the first part hereto, and subject to which and subject also to an act enacted by the Legislature of the State of Minnesota, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act of incorporation relating thereto," approved March 10th, 1862, this indenture is executed.

And, whereas, the said Minnesota and Pacific Railroad Company, by the eleventh section of said act of the Legislative Assembly of the late Territory of Minnesota was expressly authorized and empowered, in its corporate capacity, to borrow money from any person or persons, corporation or body politic of any kind and for any rate of interest which might be agreed upon by and between said company, and any person or party of whom such loan might be obtained, any
394 law on the subject of usury of said territory or future state, or any state where such transaction might be made to the contrary notwithstanding, and to make, execute and deliver all necessary writings, notes, bonds, mortgages or other obligations and securities in amount and kind as might be deemed expedient by said company in consideration of any such loan, or in discharge of any liabilities which it might incur in the construction, repair, equipment or operating of said road; and by the twenty-first section of said act of the Legislative Assembly of the late Territory of Minnesota, the same

company was further expressly authorized and empowered in its corporate capacity to make, execute, issue and deliver its bonds and obligations in any amount which the directors might deem necessary or expedient, and to prescribe the sum or sums for which each of said bonds should be issued, the time or times and place or places when and where the principal and interest of the same should be payable, the person or persons, trustee or trustees, or corporation to whom or to which they shall be payable, and whether payable to order or to bearer, or how otherwise negotiable, the rate of interest which said bonds shall bear, and the manner and form in which the interest coupons annexed to them shall be executed; and for the purpose of securing the payment of all or any of said bonds the said company was further by said twenty-first section of said act of the Legislative Assembly of the late Territory of Minnesota expressly author-
395 ized and empowered, in its corporate capacity, to make, execute and deliver one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches constructed, or authorized to be constructed, and of the estate granted by the said act of which said section was a part, and any and all other of its estate, real, personal or mixed, in possession or expectancy, and in and by such mortgage or deed of trust to confer upon the trustee or mortgagee full and ample powers to enter into and upon and take possession of, have, use and employ, or to sell and dispose of the whole or any part of said railroad and branches, and all corporate and other franchises, rights and privileges of the said company, and in case of any such sale to grant and convey to the party or parties acquiring title under such sale, and their associates, successors and assigns all and the same rights, privileges, grants, franchises, immunities and advantages in and by such mortgage or deed of trust enumerated and conveyed which belonged to and were enjoyed by said company as fully and absolutely in every respect as said company, its stockholders, officers and agents might or could have done if such sale or foreclosure had not taken place; and the directors of said company were further by said twenty-first section of said act of the Legislative Assembly of the late Territory of Minnesota, authorized and empowered to prescribe by resolution to be by them adopted all matters relating to the form and terms of any such mortgage or deed of trust, and of its execution and delivery;
and the said company being further authorized and em-
396 powered by said twenty-first section of said act of the Legislative Assembly of the late Territory of Minnesota, through its agents or brokers, or otherwise, at any place to sell, loan, pledge, hypothecate or otherwise dispose of any or all of the aforesaid bonds so as aforesaid authorized to be issued at par, or at any price less than par, and for such sum or sums and on such terms as to the said company, its agents or brokers, should appear most for its interest.

And, whereas, the Board of Directors of the said company, after the passage of the said act of the Legislative Assembly of the late Territory of Minnesota, at a meeting held in the city of St. Paul, Minnesota, on the 25th day of May, A. D. 1857, permanently organized, by the election of Edmund Rice to be President, and R. R.

Nelson to be Vice President, and by the appointment of James W. Taylor to be Secretary, of J. M. Stone to be Treasurer, and of John B. Brisbin to be attorney thereof, and after such organization, by a resolution duly passed, accepted the aforementioned act of the Legislative Assembly of the Territory of Minnesota, approved on the 22nd day of May, A. D. 1857, and the grants thereby made, so far as they related to or affected the interests of said company upon the terms and conditions, and according to the provisions in said act contained; a copy of which resolution certified by the President and Secretary of said company under its corporate seal, was on the same day deposited in the office of the Secretary of State of said Territory of Minnesota.

397 And, whereas, by an act of the Legislature of the State of Minnesota, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act of incorporation relating thereto, approved March 10th, 1862, the St. Paul and Pacific Railroad Company, the party of the first part hereto, had become vested with all the immunities, rights, benefits, privileges, lands, property, franchises and interest formerly owned or possessed by the Minnesota and Pacific Rail Road Company as in the said act provided; and whereas by an act of the Legislature of the State of Minnesota entitled "An act to amend the charter of the St. Paul and Pacific Railroad Company" approved February 6th, 1864, the St. Paul and Pacific Rail Road Company were authorized to issue preferred and special stock and to make an agreement with the holder or holders of such special stock as to the administration of portions of said railroad and the land grant appertaining thereto.

And Whereas, the St. Paul and Pacific Rail Road Company did on the 6th day of February, 1864, issue special stock and transferred to the holders of such special stock their line of road with all the property, franchises and interest belonging to the line of road of said Company between the city of St. Paul and the village of Watab and between St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, together with the lands granted by Congress to the Territory of Minnesota for the

398 purpose of aiding in the construction of said line of road with the right to extend the line of railroad from its terminus at a point between the foot of Big Stone Lake and the mouth of Sioux Wood River to any point on the Missouri River north of the forty-five parallel of North latitude. And whereas the holders of said special stock did, after such transfer at a meeting held in the city of St. Paul on the 6th day of February, 1864, permanently organize under the name and style of the First Division of the Saint Paul and Pacific Rail Road Company by the election of George L. Becker to be President and by the appointment of Samuel S. Breed to be Secretary, and Horace Thompson to be Treasurer thereof, a copy of which agreement and organization has been deposited in the office of the Secretary of State of said State of Minnesota;

And whereas the Legislature of the State of Minnesota afterwards passed an act entitled "An act to legalize and confirm the organiza-

tion acts and proceedings of the First Division of the Saint Paul and Pacific Railroad Company in relation to the character and powers of said Company which said act was approved on the 28th day of February, A. D. 1866, to which act reference is hereby made.

And whereas the said Party of the First part in pursuance of its powers under the laws of the United States and of the Territory and State of Minnesota, intends to construct a railroad from St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River. And whereas the said Party
399 of the First part prior to the execution and delivery of this instrument has executed a trust to John P. Yelverton and Samuel J. Tilden of the city of New York, trustees bearing date March 1st, 1864, conveying the whole of said railroad extending from St. Anthony to a point in the direction of Big Stone Lake a distance of one hundred and fifty miles and the equipments and appurtenances and the franchises and things therein described to secure the payment of bonds of the said party of the first part to the amount of one million five hundred thousand dollars with the interest thereon:

And whereas the said party of the first part for the purpose of constructing the said one hundred and fifty miles of road from St. Anthony to a point in the direction of Big Stone Lake did, prior to the execution and delivery of this instrument, execute a trust-deed to Edmund Rice and Horace Thompson of the City of Saint Paul aforesaid and Samuel J. Tilden of the city of New York aforesaid, trustees, bearing date the first day of March, A. D. 1864, conveying all the sections and parts of sections of land granted to late Territory of Minnesota by an act of Congress, the title to which is hereinbefore given, approved on the 3rd day of March, A. D. 1857, for the purpose of aiding in the construction of a railroad from St. Anthony to a point in the direction of Big Stone Lake a distance of one hundred and fifty miles which said lands were subsequently granted to the party of the first part by the acts of the late Territory and of the State of Minnesota as hereinbefore stated, being 3840 acres
400 of land more or less for each mile, amounting in the aggregate to 576,000 acres, be the same more or less and situated in the State of Minnesota adjoining and adjacent to the line of the railroad of said party of the first part.

And also the entire railroad of the said party of the first part from St. Anthony to a point in the direction of Big Stone Lake, one hundred and fifty miles from St. Anthony and the equipments and appurtenances and the franchises and things therein described. Subject nevertheless to the provisions and requirements of the above mentioned acts of Congress of the Legislative Assembly of the late Territory of Minnesota and of the Legislature of the State of Minnesota, and subject to the prior lien of the aforesaid deed of trust or mortgage made and delivered by the party of the first part hereto to Samuel J. Tilden and John P. Yelverton of the City of New York, trustees bearing date the 1st of March, 1864, to secure the payment of the bonds of the said party of the first part to the amount of three millions of dollars with the interest thereon.

And whereas the party of the first part has determined to locate and construct its said line of road from St. Anthony to a point on the Red River of the North called Breckenridge, a distance of 210 miles and ten miles and for the purpose of constructing and completing said road its entire length has resolved to make and deliver its bonds secured by a deed of trust or mortgage upon its property and franchises as hereinafter specified, six thousand bonds so
401 to be issued each for the sum of one thousand dollars which shall be regularly numbered and signed by the president and secretary of the party of the first part and registered and countersigned by the parties of the second part hereto and shall bear interest (with coupons therefor attached) at the rate of seven per centum per annum payable semi-annually and the tax laid or to be laid by the government of the United States and shall all become due to the holders thereof on the first day of July, A. D. 1898, and are to be issued as required for the purposes aforesaid in the aggregate to the amount of six millions of dollars, and are to stand equally and ratably secured by these presents according to the respective amounts without any preference in respect to the times of their issue and all of which bonds are in the form following:

UNITED STATES OF AMERICA. *State of Minnesota.*

$1000. $1000.

First Mortgage Bond Upon 210 *Miles of Rail Road and* 768,000 *Acres of Land.*

The First Division of the St. Paul and Pacific Rail Road Company. Main Line from St. Anthony to Breckenridge.

Know all men by these presents, that the First Division of the St. Paul and Pacific Rail Road Company representing the stock issued upon that part of its lines extending from St. Anthony to a point between the foot of Big Stone Lake and the mouth of the
402 Sioux Wood River, and from thence to any point on the Missouri river north of the 45th parallel of North latitude known as the main line of said company, is indebted to the bearer hereof in the sum of one thousand dollars lawful money of the United States of America for money borrowed for the construction of its road from St. Anthony to Breckenridge two hundred and ten miles from St. Anthony; and in consideration of such indebtedness the said First Division of the St. Paul and Pacific Rail Road Company promises and agrees to pay to the bearer hereof on the first day of May in the year one thousand eight hundred and ninety-eight at the office or agency of the said company in the city of New York or at the office of Messrs. Robert Benson & Company in the city of London at the rate of exchange of four shillings sterling per dollar at the option of the holder, the said sum of one thousand dollars with interest thereon at the rate of seven per cent. per annum payable at the said office or agency of the company in the city of New York in

semi-annual installments on the first days of May and November in each year on presentation and delivery of the interest warrants or coupons hereto annexed, and in case of the non-payment of any half-yearly installment of interest which shall have become payable and shall have been demanded, if such default shall continue six months after the maturity of the said installment, the principal of this bond shall become due in the manner and with the effect provided in the deed of trust hereinafter mentioned.

And the said company also agrees in addition to such in-
403 terest to pay all taxes which may be levied by the government of the United States upon the holder of this bond by reason of such holding and which the said company may be required to retain or pay over to any officer of such government.

This bond is one of a series consisting of six thousand each for one thousand dollars and numbered consecutively from one to six thousand inclusively all dated the first day of July in the year one thousand eight hundred and sixty-eight, and the payment of which is secured by a deed of trust or mortgage made by the said company to George L. Becker and Horace Thompson of Saint Paul and Samuel J. Tilden of the City of New York, trustees, conveying all the right, title and interest which the said company now has or may hereafter acquire by reason of the construction of the section consisting of sixty miles from a station near Big Stone Lake to Breckenridge or any part thereof to lands equal to sixty-four hundred acres per mile or in the aggregate to 384,000 acres which were granted to Minnesota by acts of Congress approved March 3rd, 1857, and March 3rd, 1865, and by reason of the construction of the line from St. Anthony to the said station near Big Stone Lake or any part thereof to lands equal to twenty-five hundred and sixty acres per mile or in the aggregate to 384,000 acres which were granted to Minnesota by act of Congress approved March 3rd, 1865, and also conveying the section of sixty miles of railroad from a station near Big Stone Lake
to Breckenridge, with its equipments and appurtenances and
404 the franchises things therein described, and also entitling the holders of the bond secured thereby to the benefits of a first mortgage on the section of one hundred and fifty (150) miles from Saint Anthony to the said section near Big Stone Lake in favor of bonds heretofore made and secured by deed of trust to John P. Yelverton and Samuel J. Tilden dated March 1st, 1864, amounting to $10,000 per mile or in the aggregate $1,500,000, said last mentioned bonds to be surrendered to the trustees named in the Deed of Trust securing this issue of bonds and held for the protection thereof.

It is hereby agreed that this bond shall be received at its par value in payment of any of the said lands which may be sold under the provisions of the said trust deed and that the said, The First Division of the St. Paul and Pacific Railroad Company shall be bound hereby only to the extent of the rights, property, franchises, equipments or appurtenances which it may now have or hereafter acquire, possess or enjoy pertaining to the line of railway in said trust deed particularly described:

This bond shall pass by delivery or by transfer on the books of the company in the city of New York or wherever else the said company may keep transfer-books. After registration of ownership certified herein by the transfer agent of the company no transfer except on the books of the company shall be valid unless the last transfer be to the bearer which shall restore transferability by delivery, but this bond shall continue subject to successive registrations and transfers to bearer as aforesaid at the option of each holder. This bond shall not become obligatory until it shall have been authenticated by a certificate endorsed hereon and duly signed by the trustees.

In witness whereof the said company has caused its corporate seal to be hereto affixed and the same to be attested by the signatures of its president and secretary on this 1st day of July in the year one thousand eight hundred and sixty-eight.

——— ———, *President.*
——— ———, *Secretary.*

Now, this Indenture witnesseth that the party of the first *part* in consideration of the premises and of one dollar to it in hand paid the receipt whereof is hereby acknowledged and in order to secure the payment of the principal and interest of the bonds aforesaid issued or to be issued as herein recited and provided and every part of the said principal and interest as the same shall become payable according to the tenor of the said bonds and of the coupons thereto annexed has granted, bargained and sold and does by these presents grant, bargain, sell, convey and transfer unto the parties of the second part all the right, title, interest, claim, or demand which the said party of the first part now has or which it shall or may hereafter acquire or become entitled to, of in or to all those sections or parts of sections of land granted to the late Territory of Minnesota by an act of Congress the title to which is hereinbefore given, approved on the third day of March, A. D. eighteen hundred and fifty-seven, for the purpose of aiding in the construction of a railroad from Stillwater by way of Saint Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River with a branch via Saint Cloud and Crow Wing to the navigable waters of the Red River of the North at such point as the legislature of said territory might determine, and which were subsequently granted to the Minnesota and Pacific Rail Road Company or to the said party of the first part by the acts of the late Territory of and of the State of Minnesota, as hereinbefore stated for the purpose of aiding the said Minnesota and Pacific Railroad Company or the said party of the first part in the construction of a railroad from St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River and also all the right, title, interest, claim or demand which the said party of the first part now has or which it shall or may hereafter acquire or become entitled to, of, in or to all those sections or parts of sections of lands granted to the State of Minnesota by an act of Congress entitled "An act extending the time for the completion of certain land-grant

Railroads in States of Minnesota and Iowa and for other purposes," approved March 3rd, 1865, and which have been granted to the party of the first part by the acts of the State of Minnesota for the purpose of aiding the said party of the first part in the construction of said railroad from St. Anthony to a point between the foot
407 of Big Stone Lake and the mouth of Sioux Wood River being 6,400 acres of land for each mile (excepting therefrom the lands which the said company has acquired or may hereafter acquire under the act of Congress approved March 3rd, 1857, for the construction of so much of said road as extends from St. Anthony to a point one hundred and fifty miles distant therefrom, and which are included in the deed of trust to Edmund Rice, Horace Thompson and Samuel J. Tilden, Trustees, dated the first day of March, 1864,) and amounting in the aggregate to 768,000 acres be the same more or less and situated in the State of Minnesota adjoining and adjacent to the line of the railroad of the said party of the first part as hereinbefore described, full lists of which will be appended to this instrument as said lands are surveyed, selected and certified which said lists are to be signed by the president of the company and to be taken and considered as part and parcel of this deed without reference to the dates of said lists and also the entire railroad of the party of the first part from St. Anthony to Breckenridge including all the railways, ways and rights of way, depot grounds and other lands, all tracks, bridges, viaducts, culverts, fences and other structures, all depots, station-houses, engine-houses, car-houses, wood-houses and other buildings and all machine shops and other shops whether now held or hereafter acquired for use in connection with the said railway or the business thereof, and including also all locomotives, tenders, cars and other rolling stock or equip-
408 ment and all machinery, tools, implements, fuel and materials for the constructing, operating, repairing or replacing the said railway or any part thereof, or any of its equipments or appurtenances whether now held or hereafter acquired, and also all franchises connected with or relating to the said railway, or the construction, maintenance or use thereof now held or hereafter acquired by the said party of the first part, and all corporate franchises, including the franchise to be a corporation, which are now or may be hereafter possessed or exercised by the party of the first part, together with all and singular the endowments, income and advantages, tenements, hereditaments and appurtenances to the above mentioned lands, railroads or property belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatever as well in law as in equity present or prospective of the said party of the first part of in and to the same and any and every part and parcel thereof with the appurtenances; subject nevertheless to the provisions and requirements of the above named acts of Congress, of the Legislative assembly of the late Territory of Minnesota and of the Legislature of of the State of Minnesota; and subject as to the 150 miles of said railroad from St. Anthony to a point

in the direction of Big Stone Lake, to the prior lien of the aforesaid Trust Deed made and delivered to John P. Yelverton and Samuel J. Tilden of the City of New York trustees, bearing date the first day of March, 1864.

And also subject as to the said 150 miles of railroad from St. Anthony to a point in the direction of Big Stone Lake, to the prior lien of the aforesaid deed of trust or mortgage made and delivered by the party of the first part hereto, to Edmund Rice, Horace Thompson and Samuel J. Tilden, Trustees, bearing date the 1st day of March, 1864, and expressly excepting and reserving herefrom the lands pertaining to said 150 miles of railroad under the act of Congress approved March 3rd, 1857.

And this indenture further witnesseth that the party of the first part for the consideration hereinbefore named, and in order to secure the payment of the principal and interest of the bonds aforesaid issued or to be issued as herein recited and provided, and every part of the said principal and interest, as the same shall become payable according to the tenor of the said bonds and of the coupons thereto annexed, has granted, bargained and sold, and does by these presents grant, bargain, sell, convey and transfer unto the parties of the second part, all the bonds secured by a trust deed or mortgage executed and delivered by the party of the first part to John P. Yelverton and Samuel J. Tilden of the city of New York, trustees, bearing date the 1st day of March, 1864, conveying the whole of said railroad extending from St. Anthony 150 miles in the direction of Big Stone Lake, and the equipments and appurtenances, and the franchises and things therein described, to secure the payment of said bonds amounting in all to one million five hundred thousand dollars with the interest to grow due thereon.

To Have and to Hold the above described premises and appurtenances subject as aforesaid unto the said parties of the second part as joint tenants and not as tenants in common and the survivors and survivor of them and to the heirs and assigns of such survivor to the only proper use and behoof of the said parties of the second part and of the survivors and survivor of them and of the heirs and assigns of such survivors.

In Trust nevertheless for the purposes herein expressed to-wit:

Article First. Until default shall be made in the payment of principal or interest of the said bonds or some of them or until default shall be made in respect to something herein required to be done or kept by the said The First Division of the St. Paul and Pacific Rail Road Company, the said company shall be suffered and permitted to possess, manage, operate and enjoy the said lands and the said railway with its equipments and appurtenances and to take and use the rents, incomes, profits, tolls and issues thereof in the same manner and with the same effect as if this deed had not been made.

Article Second. The bonds secured by deed of trust or mortgage made, executed and delivered by the party of the first to John P. Yelverton and Samuel J. Tilden bearing date March 1st, A. D.

1864, and amounting to one million five hundred thousand
111 dollars with the interest to grow due thereon shall be held by the parties of the second part in trust as a part of the security pledged by the party of the first part to the paym-nt of the bonds provided for by this instrument; and the proceeds of said bonds so held in trust, principal and interest are hereby pledged to the payment of the bonds secured by this deed of trust or mortgage.

Article Third. All moneys arising from the sales of the said lands after deducting the expenses of executing this trust are hereby pledged to the payment of the said bonds, and of the interest coupons or warrants thereto annexed, and all such moneys shall be applied by the trustees from time to time as they receive the same, first, to the payment of the interest coupons or warrants annexed to said bonds as fast as the same shall become due and payable. Secondly; in purchasing and cancelling such outstanding bonds as can be obtained at their market value not exceeding however a premium of ten per cent.; and thirdly to the payment of such of the bonds themselves as may not have been purchased in accordance with the foregoing provisions when the same shall become due and payable. But it is understood and agreed that all the current net earnings and income of the said railroad of said party of the first part, after deducing current expenses and after paying the interest on the bonds secured by the prior liens above mentioned shall be appropriated and used from time to time if necessary in the
112 payment of the interest on the bonds secured by this instrument.

Article Fourth. If there shall, at any time be a default in the payment of any interest or principal upon or of the bonds secured by this instrument as the same shall become payable and such default continue for six months, the trustees are authorized and empowered in their discretion to enter upon and sell at public auction after notice published twice a week for six weeks in one or more newspapers in New York, Saint Paul and such other place as they may think proper so much of such lands as shall be necessary to pay and satisfy such liabilities.

Article Fifth. All the trust moneys which shall come unto the hands of the trustees until the same shall be used or applied in accordance with the provisions herein contained shall be invested in Minnesota state bonds or United States stocks and the interest on such investment shall be applied in payment of the interest accruing on the bonds of this company.

Article Sixth. The said lands thus granted as aforesaid except the portion of the said lands occupied and used or that may now or hereafter be required to be occupied and used for the roadway, depots and other purposes incident and convenient to the proper working of said road shall be carefully valued and appraised by the said party of the first part, its officers or agents, in divisions and parcels as may seem to them most expedient for effecting a sale thereof, which allotments and valuations shall be made in
113 writing from time to time as may be found convenient and practicable, and shall be subject to the approval of the trustees

or a majority of them; and upon such approval a duplicate thereof shall be deposited with each of the trustees and also with the treasurer of the party of the first part; which said allotments and valuations may be varied and changed from time to time by the party of the first part as the value of the lands may be enhanced or depreciated subject to approval and deposit as aforesaid.

Article Seventh. The party of the first part shall at all times be at liberty to contract for the sale of any parcel or parcels of said land at such prices as to it shall appear fair and reasonable, and such sale or sales may be for cash or on credit or partly for cash and partly on credit; any of the bonds aforesaid shall be received at the par value thereof as cash. If such sale or sales shall be made for cash then upon the payment of such cash or surrender of such bonds to the trustees, the said trustees or any two of them shall by proper deeds or instruments executed by them or by the duly authorized agent or attorney of the said trustees, grant and convey such parcel or parcels of land to the purchaser or purchasers thereof by full and sufficient deeds. If such sale or sales shall be made on credit in whole or in part then the said trustees or any two of them shall by proper deeds or instruments executed as aforesaid grant and convey such parcel or parcels of land to the purchaser or purchasers thereof and shall receive from such purchaser or purchasers his or
414 their note or notes, bond or bonds, or other instruments in writing for the part of such price then unpaid and shall hold the same and all moneys received therefrom upon the trusts herein mentioned. And in either case the said deeds shall invest said purchasers with the complete title free and clear of all incumbrances on account of the issue of the bonds secured by this instrument and shall include as well the title of the company as of the trustees aforesaid.

Article Eighth. The trustees shall have full power from time to time to employ such clerks and assistants as they shall find necessary to enable them to discharge properly the duties devolving upon them under the provisions of this instrument in respect to the sale or conveyance of the lands granted as aforesaid by the government of the United States; and they shall also have power to appoint an agent or attorney to execute conveyances of said lands, and to act generally in their behalf in respect thereto, and from time to time to remove such agent and appoint another in his place; and all conveyances executed by such agent or attorney and other acts performed within the scope of his powers shall be legal and valid in the same manner as if executed or done by the trustees.

Article Ninth. Conveyances of the lands granted by the United States may be from time to time and at all times, executed by any two of the trustees or under their authority by any agent appointed as provided in article eight; and being so executed shall be effectual to divest the title of all the trustees; but in respect to any
415 conveyances so made or the lands embraced therein or the proceeds of the sale thereof the trustee not joining shall be in no manner answerable.

Article Tenth. In case default shall be made in the payment of

any interests on any of the aforesaid bonds secured by this instrument issued or to be issued according to the tenor of the coupons thereto annexed or in any requirement to be done or kept by the party of the first part and if such default shall continue for the period of six months it shall be lawful for the said trustees or the survivors or survivor of them or their or his successors personally or by their or his attorney or agents to enter into and upon all and singular the premises hereby conveyed or intended so to be and each and every part thereof and to have, hold and use the same operating by their or his superintendents, managers, receivers or servants or other attorneys or agents, the said railway and conducting the business thereof and making from time to time all repairs and replacements and such useful alterations, additions and improvements, thereto as may seem to them or him to be judicious, and to collect and receive all tolls, freights, incomes, rents, issues and profits of the same and of every part thereof; and after deducting the expenses of operating the said railroad and conducting its business and of all the said repairs, replacements, alterations, additions and improvements and all payments which may be made for taxes, assessments, charges or liens prior to the lien of these presents upon the said premises or any part thereof as well as a just compensation for their or his
416 own services to apply the moneys arising as aforesaid to the payment of interest in the order in which such interest shall have become or shall become due ratably to the persons holding the coupons evidencing the right to such interest, and after paying all interest which shall have become due to apply the same to the satisfaction of the principal of the aforesaid bonds which may be at that time unpaid ratably and without discrimination or preference.

Article Eleventh. In case default shall be made as aforesaid and shall continue as aforesaid it shall likewise be lawful for the said trustees or the survivors or survivor of them or their or his successors after entry as aforesaid or other entry or without entry personally or by their or his attorneys or agents to sell and dispose of all and singular the premises hereby conveyed or intended so to be or only so much or such parts thereof as they shall deem necessary and proper with a due regard to the interests of all parties at public auction in the city of New York or at such place within the state of Minnesota as the said trustees may designate and at such times as they may appoint, having first given notice of the place and the time of such sale by advertisement published not less than three times a week for four months or such shorter time not less than forty days as the party of the first part may by resolution of its board of directors assent to in one or more newspapers in the cities of New York and Saint Paul, or to adjourn the said sale from time to time in
417 their or his discretion and if so adjourning to make the same at the time and place to which the same may be so adjourned; and on receiving full payment for the same to make and deliver to the purchaser or purchasers thereof good and sufficient deeds or deeds in the law for the same in fee simple, which sale made as aforesaid shall be a perpetual bar in law and equity against the party of the first part and all other persons lawfully claiming or to claim the said

COPY BOUND

premises or any part thereof by, from, through or under it, and after deducting from the proceeds of such sale just allowances for all expenses of the said sale including attorneys and counsel fees and all other expenses advances or liabilities which may have been made or incurred by the said trustees in operating or maintaining the said railway or in managing its business while in possession and all payments which may have been made by them for taxes or assessments and for charges and liens prior to the lien of these presents on the said premises or any part thereof as well as compensation for their own services to apply the said proceeds to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid whether or not the same shall have previously become due and of the interest which shall at that time have accrued on the said principal and be unpaid without discrimination or preference but ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest; and if after satisfaction thereof a surplus of the said proceeds shall remain, to pay over the same to the said First
418 Division St. Paul and Pacific Railroad Company or to such other parties as may be entitled to receive the same.

And it is hereby declared that the receipt or receipts of the said trustees shall be a sufficient discharge to the purchaser or purchasers of the premises or of any part thereof for his or their purchase money and that such purchaser or purchasers, his or their heirs, executors or administrators shall not after payment thereof and having such receipt be liable to see to its being applied upon or for the trusts and purposes of these presents or in any manner whatsoever be answerable for any loss misapplication or non-application of such purchase money or any part thereof or be obliged to inquire into the necessity, expediency or authority of or for any such sale.

Article Twelfth. At any sale of the aforesaid railroad equipments and appurtenances or any part thereof whether made by virtue of the power herein granted or by judicial authority the trustees may bid for and purchase or cause to be bid for and purchased the property so sold or any part thereof in behalf of all the holders of the bonds secured by this instrument and then outstanding in the proportion of the respective interests of such bondholders at a reasonable price if but a portion of the said property shall be sold, or if all of it be sold, at a price not exceeding the whole amount of such bonds outstanding with the interest accrued thereon.

Article Thirteenth. In case default shall be made in the
419 payment of any half year's interest on any of the aforesaid bonds, at the time and in the manner in the coupon issued therewith provided, the said coupon having been presented and the payment of the interest therein specified having been demanded, and that such default shall continue for the period of six months after the said coupon shall have become due, and then and in such case the principal of all the bonds secured hereby shall, at the election of the trustees, become immediately due and payable, anything contained in the said bonds or herein to the contrary notwithstanding; but a majority in interest of the holders of the said bonds may, in writing or by a vote of the meeting duly held instruct the trustees to

OUND CLOSE IN CENTER

declare the said principal to be due, or to waive the right so to declare on such terms and conditions as such majority shall deem proper, or may annul or reverse the election of the trustees, provided that no action of the trustees or bondholders shall extend to or be taken to effect any subsequent default or to impair the rights resulting therefrom. Meetings of the holders of the bonds secured by this instrument may be called by the trustees or in such other mode as may be fixed by regulations prescribed or established as hereinafter provided and the bondholders may vote thereat in persons or by proxy; and the quorum may be defined and such other regulations or by-laws in respect to such meetings may be from time to time established altered or repealed by the bondholders acting by
420 a majority in interest as to them shall seem expedient; and until the bond-holders shall act such powers may be temporarily exercised by the trustees, the trustees shall have a right to require at their option that any act or resolution of the said bondholders affecting their duties or the interest of the trust thereby created shall be authenticated by the signatures of all the persons assenting thereto as well as by a minute of the proceedings of the meeting.

Article Fourteenth. The party of the first part shall from time to time and at all times hereafter and as often as thereunto requested by the trustees, execute, deliver and acknowledge all such further deeds, conveyances and assurances in the law for the better assuring unto the trustees and their successors in the trust thereby created upon the trust therein expressed the lands, railway, equipments and appurtenances hereinbefore mentioned or intended so to be and all other property and things whatsoever which may be hereafter acquired for use in connection with the same or any part thereof and all franchises now held or hereafter acquired including the franchise to be a corporation as by the trustees or the survivors or survivor of them or their successors or by their or his counsel learned in the law shall be reasonably advised, devised or required; and the party of the first part shall furnish to the parties of the second part from time to time upon their reasonable request in writing a true and full inventory of all the movable property appertaining to the said railroad and the operation thereof and which is transferred
421 or agreed to be transferred by this indenture; but no default to demand or to furnish such inventory shall impair the operation or effect of this indenture upon all or any of the property herein agreed to be transferred.

Article Fifteenth. The trustees shall have full power in their discretion and upon the written request of the party of the first part to convey by way of release or otherwise to the persons designated by the said party of the first part the whole or any part of any lands acquired or held for the purposes of stations, depots, shops or other buildings, or the uses connected therewith; and shall also have power to convey as aforesaid any lands whether donated by the United States government which in the judgment of the trustees shall not be necessary for use in connection with the said railroad or which may have been held for a supply of fuel, gravel or other material.

And also to convey as aforesaid any lands which may become disused by reason of a change of the location of any station-house, depot, shop or other building connected with the said railway and such lands occupied by the track and adjacent to such stationhouse, depot, shop or other building as the said party may deem it expedient to disuse or abandon by reason of such change, and to consent to any such change and to such other changes in the location of the tracks as in their judgment shall have become expedient; and to make and deliver the conveyances necessary to carry the same into
422 effect; but any lands which may be acquired for permanent use in substitution for any so released shall be conveyed to the trustees upon the trusts of these presents; and the trustees shall also have full power to allow the said party of the first part from time to time to dispose of according to its discretion such portions of the equipments, machinery and implements at any time held or acquired for the use of said railway as may have become unfit for such use, replacing the same by new which shall be conveyed to the trustees or be otherwise made subject to the operation of these presents.

Article Sixteenth. If the said party of the first part shall well and truly pay the sums of money herein required to be paid by the said party and all interest thereon at the times and in the manner herein specified, and shall well and truly keep and perform all the things herein required to be kept or performed by the said party according to the true intent and meaning of these presents then and in that case the estate, right, title and interest of the said parties of the second part and of their successors in the trust hereby created shall cease, determine and become void; otherwise the same shall be and remain in full force and virtue.

Article Seventeenth. It is hereby declared and agreed that it shall be the duty of the trustees to exercise the power of entry hereby granted or the power of sale hereby granted or both, or to take appropriate legal proceedings to enforce the rights of the bondholders under these presents upon the requisition in writing as here-
423 inafter specified as applicable to the several cases of default in the manner and subject to the qualifications hereinafter provided as follows:

1. If the default be as to interest or principal of any bonds provided for by these presents such requisition upon the said trustees shall be by holders of not less than two hundred and fifty thousand dollars in aggregate amount of the said bonds; and upon such requisition and a proper indemnification by the persons making the same to the trustees against the costs and expenses to be by them incurred, it shall be the duty of the trustees to enforce the rights of the bondholders under these presents by entry sale or legal proceedings as they being advised by counsel learned in the law shall deem most expedient for the interest of all the holders of the said bonds.

2. If the default be in the omission of any act or thing required by article fourteenth of these presents for the further assuring of the title of the trustees to any property or franchises now possessed or hereafter acquired or in any provisions herein contained to be per-

formed or kept by the said company, then and in either of such cases the requisitions shall be as aforesaid; but it shall be within the discretion of the trustees to enforce or waive the rights of the bondholders by reason of such default, subject to the power hereby declared of a majority in interest of the holders of the said bonds, by requisition in writing or by vote at a meeting duly held to instruct the said trustees to waive such default or to enforce their
424 rights by reason thereof provided that no action of the said trustees or bondholders or both in waiving such default or otherwise shall extend to or taken to affect any subsequent default or to impair the rights resulting therefrom.

Article Eighteenth. It is mutually agreed by and between the parties hereto that the word "Trustees" as used in these presents shall be construed to mean the Trustees for the time being whether all or any be original or new; and whenever a vacancy shall exist to mean the surviving or continuing trustees, or trustee; and such trustees or trustee shall during such vacancy be competent to exercise all the powers granted by these presents to the parties of the second part. And it is mutually agreed by and between the parties hereto as a condition on which the parties of the second part have assented to these presents that the said trustees shall not be in any manner responsible for any act, default or misconduct of each other nor for any default or misconduct of agents by them employed nor shall either of them be answerable except for his own wilful default or misconduct; that the said trustees shall be entitled to just compensation for all services which they may hereafter render in their trust to be paid by the said company; that either of the said trustees or any successor may resign and discharge himself of the trust created by these presents by notice in writing to the First Division of the St. Paul and Pacific Railroad Company and to the existing trustees or trustee if there be such three months before such
425 resignation shall take effect or such shorter time as they or he may accept as adequate notice, and upon the due execution of the conveyances hereinafter acquired; that the said trustees or any or either of them may be removed by the vote of a majority in interest of the holders of the aforesaid bonds, the said vote being had at a meeting duly held of the said bondholders and attested by an instrument under the hands and seals of the persons so voting; that in case at any time hereafter either of the said trustees or any trustee hereafter appointed shall die or resign or be removed as herein provided or by a court of competent jurisdiction or shall become incapable or unfit to act in the said trust a successor to such trustee shall be appointed by the surviving or continuing trustees or trustee with the consent of the holders for the time being of a majority in interest of the said bonds then outstanding or the consent of a meeting duly held of the holders of said bonds; and the trustee so appointed with the trustees or trustee so surviving or continuing shall thereupon become vested with all the powers, authorities and estates granted to or conferred upon the parties of the second part by these presents, and all the rights and interests requisite to enable him to execute the purposes of this trust without any further assurance or conveyance so far as such effect may be lawful; but the surviving or

continuing trustees or trustee shall immediately execute all such conveyances and other instruments as may be fit or expedient
426 for the purpose of assuring the legal estate in the premises jointly with themselves or himself to the trustee so appointed; and upon the death, resignation or removal of any trustee or any appointment in his place in pursuance of these presents all his powers and authorities by virtue thereof shall cease; and all the estate right, title and interest in the said premises of any trustee so dying resigning or being removed shall, if there be a co-trustee or co-trustees surviving or continuing in office wholly cease and determine; but the said trustee so resigning or being removed shall on the written request of the new trustee who may be appointed immediately execute a deed or deeds of conveyance to vest in such new trustee jointly with the continuing trustees or trustee and upon the trusts herein expressed all the property, rights and franchises which may be at that time held upon the said trusts. And in case it shall at any time hereafter prove impracticable after reasonable exertions to appoint in the manner hereinbefore provided a successor in any vacancy which may have happened in said trust, application in behalf of all the holders of the bonds secured hereby may be made by the surviving or continuing trustees or trustee; or if the trust be wholly vacant by holders of the said bonds to the aggregate amount of one hundred thousand dollars to any circuit court of the United States for any judicial district in which any part of the aforesaid railway may be situate, for the appointment of a new trustee or new trustees; provided however that at least one of the said trustees shall
427 always be a citizen of the state of Minnesota.

In witness whereof the party of the first part hath caused its corporate seal to be hereunto affixed and the same to be attested by the signatures of its president and secretary and the parties of the second part have hereunto set their hands and seals to testify their acceptance of the trust hereby created the day and year first above written.

THE FIRST DIVISION OF THE ST. PAUL AND PACIFIC RAIL ROAD COMPANY.
By GEO. L. BECKER, *President*.

[CORPORATE SEAL.]

Attest:
SAML. S. BREED, *Secretary*.

GEORGE L. BECKER. [SEAL.]
HORACE THOMPSON. [SEAL.]
SAMUEL J. TILDEN. [SEAL.]

As to the signatures of George L. Becker and Horace Thompson in presence of:
ALBERT SCHEFFER,
HERMAN TROTT.

As to signature of Samuel J. Tilden:
JAS. P. SINNOTT,
WM. SAVAGE.

(Duly acknowledged.)
(Duly certified by the Secretary of State of Minnesota.)

428 DEFENDANT'S EXHIBIT 31.

Whereas in and by a certain judgment and decree made and entered on the 24 day of March, 1879, in a certain action pending in the District Court for the second judicial district in the county of Ramsey, wherein Horace Thompson and John S. Kennedy, trustees are plaintiffs and the First Division of the Saint Paul and Pacific Railroad Company, George L. Becker, William G. Moorhead, Henry Hale, and James E. Southworth as trustees, Henry T. Wells, Greenleaf Clark and Edwin C. Litchfield as trustees, and Martin Farrant, John D. Gray, Augustus Moores, Peter S. Le Claire, Charles Haywood, James J. Cartledge, and Frank L. Honore, Lewis Baker, and The Saint Anthony Iron Works, are defendants and which said action was brought to foreclose a certain mortgage or deed of trust bearing date the 1st day of July, 1868, executed by said defendant The First Division of the Saint Paul and Pacific Railroad Company to the plaintiff Horace Thompson, the defendant George L. Becker and one Samuel J. Tilden, as trustees upon all and singular certain property, premises, rights immunities and franchises in said judgment and decree specified and hereinafter described, to secure certain mortgage bonds issued and negotiated by said defendant The First Division of the Saint Paul and Pacific Railroad Company bearing even date with said mortgage or deed of trust to the aggregate amount of $6,000,000—as found and adjudged in
429 and by said mortgage judgment and decree and for a more full description of which said mortgage or deed of trust, reference is hereby made to said judgment and decree and to the complaint in said action, it was among other things adjudged and decreed, that all and singular the said property, premises, rights, immunities and franchises so described in and covered by the said mortgage or deed of trust be sold at public auction at some suitable place in the county of Hennepin and State of Minnesota, by and under the direction of the sheriff of said county of Hennepin, to the highest and best bidder in two separate parcels, as follows, viz:

Those certain bonds secured by a mortgage dated March 1st, 1864, to John P. Yelverton and Samuel J. Tilden, trustees, and held by the plaintiffs in said action, and fully described in said judgment and decree, should be first sold as one entire property, and in one parcel, and unless such parcel should sell for a sum sufficient to pay and satisfy the amount adjudged by said judgment and decree to be due for principal and interest upon the bonds secured under said mortgage of July 1st, 1868, with accruing interests and costs that all and singular the rest and residue of the said mortgaged premises, that is to say all and singular the said mortgage premises, land grants, lands, property, rights, immunities and franchises adjudged by said judgment and decree to be covered by and subject to the lien of the said mortgage of July 1st, 1868, (except said bonds secured under said mortgage to John P. Yelverton and Samuel
430 J. Tilden, trustees as aforesaid) should then be sold as one entire property and in one parcel, subject, however, as to

said line of railroad extending from Saint Anthony, westward 150 miles in the direction of Big Stone Lake to the prior lien of the said mortgage of March 1st, 1864, to John P. Yelverton and Samuel J. Tilden, trustees, and subject also as to the same 150 miles of railroad last mentioned, to the prior lien of the mortgage of March 1st, 1864, for $3,000,000, referred to in said judgment and decree, and saving and excepting from such sale, all such pieces, parcels and tracts of land as had before the entry of said judgment and decree been granted and conveyed in said mortgage of July 1st, 1868, under and in pursuance of the terms and provisions thereof; that the said sheriff should give public notice of the time and place of such sale according to law and the course and practice of said court, and make report thereof to the court, and that upon the payment of the purchase money as in said judgment and decree provided and the confirmation of such sale by the court, the said sheriff should execute and deliver a proper certificate of sale or conveyance of the premises to the purchaser or purchasers thereof, and deliver to the purchaser thereof the said bonds so held by the plaintiffs and secured under said mortgage of March 1st, 1864, to John P. Yelverton and Samuel J. Tilden, trustees.

And whereas a transcript of said judgment and decree, duly certified by the clerk of said court, was on the 9th day of April, 1879, duly delivered to me the undersigned Nathaniel R. Thomp-
431 son, sheriff of said county of Hennepin, by the plaintiffs in said action, under and by virtue of which I, as such sheriff, did give due and legal public notice of the sale of said premises as provided in the said judgment and decree in pursuance of the statute in such case made and provided, by causing a notice containing the specifications required by law and setting forth the terms and conditions of sale embodied in said judgment and decree, and referring in proper terms to the limitations, conditions, savings and exceptions in said judgment and decree provided, and stating that the said premises would be sold at public auction to the highest and best bidder, at the front door of the court house, in the city of Minneapolis, in said county of Hennepin, on the 2nd day of June, 1879, at eleven o'clock in the forenoon of that day, by the sheriff of said county of Hennepin, to be posted for six weeks successively in three public places in said county of Hennepin, where a portion of said mortgaged premises and property is situated, and by causing a copy of said notice to be published once a week for the same period of six weeks successively in a newspaper printed and published daily in the city of Minneapolis, in said county of Hennepin, called the "Minneapolis Tribune."

And, whereas, pursuant to said notice, and at the time and place therein specified, to-wit: on the 2nd day of June, 1879, at eleven o'clock in the forenoon, at the front door of the court house, in the city of Minneapolis, in said county of Hennepin, all and singular the said property and premises so advertised by me for sale
432 and hereinafter specifically described, were by me duly struck off and sold to the "Saint Paul, Minneapolis and Manitoba Railway Company," a corporation duly constituted and organized

under the laws of the state of Minnesota, in the order and for the sums following, viz.:

First. The said bonds and coupons so secured under the said mortgage of March 1st, 1864, to John P. Yelverton and Samuel J. Tilden, trustees, and in the possession of said plaintiffs as aforesaid, as one property and in one parcel, for the sum of nine hundred thousand ($900,000) dollars, the said corporation last mentioned being the highest bidder, and that being the highest sum bidden for the same.

Second. All and singular the property and premises so advertised by me, other than said bonds and coupons, as one property and in one parcel, for the sum of four hundred and fifty thousand ($450,000) dollars, the said last mentioned corporation being the highest bidder, and that being the highest sum bidden for the same. To all of which facts and matters hereinabove recited I do hereby certify.

And, whereas, I have duly made report of said sale and of all proceedings thereon to said court, as required by said judgment and decree, and which said report has been in all things duly confirmed by the court, whereby the said purchaser has become entitled to a proper certificate or conveyance of the said property and premises as in said judgment and decree provided.

433 Now, therefore, these presents witness: That I, Nathaniel R. Thompson, sheriff of said county of Hennepin, by virtue of the authority in me vested as such sheriff, and of the said judgment and decree, and of the statute in such case made and provided, in consideration of the premises hereinabove recited, and of the sum of one million three hundred and fifty thousand ($1,350,000) dollars, to me in hand paid by the said "The Saint Paul, Minneapolis and Manitoba Railway Company," the receipt whereof is hereby acknowledged, have struck off and sold as aforesaid, and do hereby grant and convey to the said "The Saint Paul, Minneapolis and Manitoba Railway Company," and to its successors and assigns forever all and singular the said property and franchises so struck off and sold to said corporation as aforesaid, to-wit:

First. Certain negotiable bonds or obligations in writing, fifteen hundred in number, for $1,000 each, with the unpaid coupons thereto annexed, executed by the defendant corporation, The First Division of the Saint Paul and Pacific Railroad Company, on or about the 1st day of March, 1864, all bearing date on the day and year last aforesaid, payable to bearer on the 1st day of August, 1894, and bearing interest from date at the rate of seven per cent. per annum, payable semi-annually on the 1st day of August and February in each year, with coupons thereto attached, and which said bonds are secured in and by the aforesaid mortgage, bearing date the 1st day of March, 1864, executed to John P. Yelverton

434 and Samuel J. Tilden, trustees, by said defendant corporation, and covering that portion of its main line of railroad extending from Saint Anthony to a point 150 miles westerly in the direction of Big Stone lake, being the same bonds alleged in the complaint in said action to have been granted, bargained, sold, conveyed and transferred to the trustees in said mortgage of July 1st, 1868, being

foreclosed in said action, as a further security for the bonds secured thereunder, to which bonds are attached coupons for the interest accrued and to accrue thereon from and after the first day of August, 1871, except six of said bonds which drew interest from February 1st, A. D. 1874, and one of said bonds which draws interest from February 1st, 1876.

Second. The line of railroad of said defendant corporation, The First Division of the Saint Paul and Pacific Railroad Company, commonly known as its main line, extending from Saint Anthony westwardly to Breckenridge, together with all and singular the railways, ways and rights of way, depot grounds and other lands, all tracts, bridges, viaducts, culverts, fences and other structures; all depots, station houses, engine houses, car houses, freight houses, wood houses and other buildings; and all machine shops and other shops; all locomotives, tenders, cars and other rolling stock or equipments; and all machinery, tools, implements, fuel and materials for the constructing, operating, repairing or replacing the said railway; also all franchises connected with or relating to the said railway; or the construction, maintenance or use thereof; and all cor-
435 porate franchises, including the franchise to be a corporation, and all other property of the said corporation appertaining to the said line of railroad, real personal or mixed, whether owned on the 1st day of July, 1868, the date of the mortgage foreclosed in the said action, or afterwards acquired, together with all and singular the land grants, tracts, sections and parcels of land had, granted to or acquired by said defendant corporation, The First Division of the Saint Paul and Pacific Railroad Company, appertaining to the said line of railroad under or by virtue of the congressional grants, approved March 3rd, 1857, and March 3rd, 1865, and the Legislative acts of the State of Minnesota, in the complaint in said action named, excepting the lands acquired or to be acquired under the said act of Congress, approved March 3rd, 1857, for the construction of so much of said railroad as extends from Saint Anthony to a point 150 miles westerly therefrom, and which are included in that certain mortgage, dated March 1st, 1864, for $3,000,000, in said complaint named; together with all and singular the endowments, income and advantages, tenements, hereditaments and appurtenances to said lands, railroad or property belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof; saving and excepting, however, all such pieces, parcels and tracts of land as had prior to the date of said judgment and decree been granted and conveyed by the trustees in the said mortgage of July 1st,
436 1868, pursuant to the terms and provisions thereof, and subject as to the said 150 miles of railroad extending from St. Anthony in the direction of Big Stone lake, to the prior lien of the said mortgage to John P. Yelverton and Samuel J. Tilden, dated March 1st, 1864, for $1,500,000, and also subject as to said 150 miles of railroad last named, to the prior lien of that certain mortgage, dated March 1st, 1864, for $3,000,000, hereinabove referred to; and subject to the terms, conditions, provisions, savings and exceptions

in said judgment specified and mentioned to which, for greater certainty, reference is hereby made.

To have and to hold the above granted premises, with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in any wise appertaining unto the said The Saint Paul, Minneapolis and Manitoba Railway Company, its successors and assigns forever.

In testimony whereof, as such sheriff, I have hereunto set my hand and affixed my seal this twelfth day of June, 1879.

N. R. THOMPSON. [SEAL.]
Sheriff of Hennepin Co., Minn.

Signed, sealed and delivered in presence of
GEO. L. OTIS.
R. B. GALUSHA.

(Duly verified.)
(Duly certified by the Secretary of State of Minnesota.)

437 DEFENDANT'S EXHIBIT 32.

Trust Deed of St. Paul and Pacific R. R. Co., Dated April 1, 1871.

Extension Mortgage.

This indenture, made the first day of April, in the year of our Lord one thousand eight hundred and seventy-one, between the Saint Paul and Pacific Railroad Company, a corporation of the state of Minnesota, of the first part, and Horace Thompson and George L. Becker, of Saint Paul, in said state, and William G. Moorhead, of Philadelphia, in the state of Pennsylvania, of the second part.

Whereas, the said Saint Paul and Pacific Railroad Company is a corporation of the state of Minnesota, duly created and organized under the laws thereof, and particularly under a certain act of the legislature of said state, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act of incorporation relating thereto," approved March 10th, 1862, and acts amendatory thereof, or relating to the railroad therein described, approved, respectively, February 6th, 1864, March 4th, 1864, and March 2d, 1865.

And, whereas, the said company is duly authorized and empowered by law to construct, maintain and operate the railroads in the state of Minnesota hereinafter mentioned and described as the branch lines of the Saint Paul and Pacific Railroad, to be constructed
438 from Saint Cloud to Saint Vincent, and from Watab to Brainard, in the said state; and for the construction, maintenance and equipment thereof to borrow money, and enter into any and all agreements, and assume any and all liabilities which it may deem proper, and particularly to execute, acknowledge and deliver a deed of trust or mortgage upon the said branch lines of

railroad and the land grants connected therewith in the manner and form of this indenture.

And, Whereas, the Congress of the United States heretofore, to-wit, by a certain act thereof entitled "An act making a grant of land to the territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands, in alternate sections, to the state of Alabama, to aid in the construction of certain railroads in said state," approved March 3rd, 1857, and by a certain other act thereof, entitled "An act extending the time for the completion of certain land grant railroads in the states of Minnesota and Iowa, and for other purposes," approved March 3d, 1865, granted to the said state of Minnesota certain lands for the purpose of aiding in the construction of railroads from St. Cloud aforesaid, by way of Crow Wing, to Saint Vincent aforesaid, and also from Saint Cloud to the waters of Lake Superior.

And whereas, the said state of Minnesota, by the legislative acts thereof aforesaid, granted the said lands applicable to the construction of said railroads from Saint Cloud to Saint Vincent, and from Saint Cloud to the waters of Lake Superior, to the said Saint
439 Paul and Pacific Railroad Company, as by reference to said legislative acts will more fully and at large appear.

And, whereas, the Congress of the United States aforesaid, by another act thereof, to-wit, an act entitled "An act authorizing the St. Paul and Pacific Railroad Company to change its lines, in consideration of a relinquishment of lands," approved March 3d, 1871, enacted and declared: "That the St. Paul and Pacific Railroad Company may so alter its branch lines that, instead of constructing roads from Crow Wing to Saint Vincent, and from Saint Cloud to the waters of Lake Superior, it may locate and construct, in lieu thereof, a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter's Tail, or Rush Lake, so as to form a more direct route to Saint Vincent, with the same proportional grant of land, to be taken in the same manner, along the said altered line, as is provided for the present lines by existing laws; provided, however, that this change shall in no manner enlarge said grant, and that this act shall only take effect upon the condition of being in accord with the legislation of the state of Minnesota; and upon the further condition that proper releases shall be made to the United States by said company of all lands along said abandoned lines from Crow Wing to Saint Vincent, and from Saint Cloud to Lake Superior, and that, upon the execution of said releases such lands so released shall be considered as immediately restored
440 to market, without further legislation.

And, whereas, the act of said congress last aforesaid was in conformity with the legislation of the state of Minnesota, and particularly with the act thereof aforesaid, approved February 6th, 1864.

And, whereas, the said company has duly accepted the act of congress last aforesaid, and duly resolved to alter and re-locate its branch lines of railroad, as herein provided, and to execute and

deliver the releases of the lands along said abandoned route therein mentioned.

And, whereas, the said party of the first part has entered into a certain contract, bearing even date herewith, for the construction and equipment of said railroads from St. Cloud to St. Vincent, and Watab to Brainerd, with a certain other company of the state of Minnesota, known as the First Division of the Saint Paul and Pacific Railroad Company, being a corporation created and organized under an act of the legislature of the said state, entitled "An act to amend the charter of the St. Paul & Pacific Railroad Company," approved February 6th, 1864; and in and by such contract the last mentioned company has agreed to issue and offer for sale and negotiation for the use and benefit of the said party of the first part in the construction and equipment of said railroad a series of bonds amounting to the sum of fifteen millions of dollars, and payable and secured to be paid as hereinafter described; and the said party of the first part has agreed to assume and secure the pay-
441 ment of the said bonds according to the terms thereof.

And, whereas, pursuant to such construction contract, and in due conformity therewith, the said First Division of the St. Paul & Pacific Railroad Company has duly resolved to execute and issue its certain bonds or obligations of one thousand dollars each, payable to the said parties of the second part hereto, as trustees, or to bearer, on the first day of January, in the year of our Lord one thousand nine hundred and one, and bearing interest at the rate of seven per centum per annum, payable semi-annually on the first days of January and July in each year, in the lawful money of the United States, if demanded in New York, or in British pounds sterling, at the rate of four shillings British money per dollar, if demanded in London, at the option of the holder.

And, whereas, the said bonds, or as many thereof as may be necessary, are to be issued and negotiated for the purpose of procuring means to construct and equip the said lines of railroad, and are to be equally and ratably secured hereby, without discrimination or preference between them on account of the times of actual issue or negotiation; and, whereas, the said bonds are all of like tenor
442 and date, and in the form following:

UNITED STATES OF AMERICA. $1,000.

State of Minnesota.

(Vignette.) (Vignette.)

First Mortgage Bond.

Upon 348 Miles of Railroad and 2,217,200 Acres of Land.

Issued by The First Division of the St. Paul and Pacific Railroad Company.

To Construct Roads from St. Cloud to St. Vincent and from Watab to Brainerd.

Know all men by these presents, that the First Division of the St. Paul and Pacific Railroad Company is indebted to Horace

Thompson and George L. Becker, of St. Paul, and William G. Moorhead, of Philadelphia, trustees or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which said sum the said company hereby promises to pay to the said trustees, or to the bearer hereof, on the first day of January, in the year one thousand nine hundred and one, in the lawful money aforesaid, at its office or agency in the city of New York, or in British pounds sterling, at the rate of four shillings per dollar, at the agency of the said company in the city of London, England, at the option of the holder, with interest on the said principal sum at the rate of seven per cent. per annum, payable semi-annually, on the first days
443 of January and July in each year, in the lawful money aforesaid, on presentation and surrender of the coupons hereto annexed, as they severally become due, at the said office or agency in New York, or payable in British pounds sterling at the rate of four shillings for each dollar, on presentation and surrender of such coupons, respectively, at the banking house of Robert Benson & Co., in London, England, at the option of the holder, which payment of interest shall in all cases be made without deduction or abatement of any income or other tax imposed or to be imposed by the government of the United States, or any law thereof, and which the said company lawfully might deduct from such interest, to pay over to any officer of said government; it being understood that such taxes are to be paid by the said company in addition to such interest. And it is hereby expressly declared and agreed that, in case default shall be made in the payment, as aforesaid, of any semi-annual installment of interest on this bond, and such installment of interest shall remain unpaid and in arrear for the period of six months, after the same shall have become due and been demanded, the principal of this bond, as well as of all the bonds of the series of which this is one, shall become and be due and payable immediately, but subject, nevertheless, to the provisions in that behalf of the deed of trust or mortgage hereinafter mentioned.

This bond is one of a series of fifteen thousand bonds of like tenor and date, numbered consecutively from 1 to 15,000,
444 inclusively, and amounting in the aggregate to fifteen millions of dollars, and the payment of the principal and interest whereof is secured by a certain deed of trust or mortgage, bearing even date herewith, duly executed and delivered by the Saint Paul and Pacific Railroad Company (being the corporation owning the railroad for the construction of which these bonds are issued) to the said Horace Thompson, George L. Becker and William G. Moorhead, trustees, and which conveys to the said trustees certain railroads, which the said St. Paul and Pacific Railroad Company is authorized to construct and operate in the said state of Minnesota, to-wit, a railroad from a point at or near St. Cloud to St. Vincent, being a distance of two hundred and ninety-three (293) miles, more or less, and a railroad from Watab to Brainerd, being a distance of fifty-five (55) miles, more or less; together with the equipments and appurtenances of the said railroads, respectively, and the rights, privileges and franchises thereunto respectively appertaining; and

which conveys also to the said trustees all the right, title and interest which the company last aforesaid now has, or shall or may hereafter acquire by the construction of said railroads, or any part thereof, or otherwise, in, to, or concerning certain lands situate in the said state, which were heretofore granted by the Congress of the United States to aid in the construction of such railroads, by acts of the said congress approved, respectively, March 3d, 1857, March 3d, 1865, and March 3d, 1871; the extent and aggregate area of
445 such lands to which said company will become entitled by the construction of said railroads, under existing legislation, being estimated at two millions two hundred and seventeen thousand and two hundred (2,217,200) acres, more or less.

This bond shall pass by delivery, unless registered in the name of the owner on the books of the company in New York or London, but after a registration of ownership, certified hereon by the transfer agent or officer of the company, no transfer hereof, except upon the books of the company, shall be valid, unless the last preceding transfer shall have been to bearer; but this bond shall continue subject to successive registration of ownership and transfers to bearer at the option of each holder.

This bond is made, by the terms of the deed of trust or mortgage aforesaid, receivable at par in payment for any and all lands embraced in said deed, which may be sold by the Saint Paul and Pacific Railroad Company in conformity therewith. This bond shall not become valid or obligatory until authenticated by a certificate endorsed hereon, and duly signed by the trustees under said deed.

In witness hereof, the said company has caused its corporate seal to be hereunto affixed, and the same to be attested by the signatures of its president and secretary, and has likewise caused the coupons hereto annexed to be signed by its secretary, this first day
446 of April, one thousand eight hundred and seventy-one.

—— ——, *President.*

—— ——, *Secretary.*

Now, therefore, this indenture witnesseth, that the St. Paul & Pacific Railroad Company aforesaid, being the party of the first part hereto, in consideration of the premises and of the sum of one dollar, to the said company duly paid at or before the ensealing and delivery of these presents by the said parties of the second part, the receipt whereof is hereby acknowledged, has promised and agreed, and by these presents does promise and agree, to and with the said parties of the second part, for the benefit of any and all persons who shall or may become holders for value of the bonds aforesaid, or any of them, or of any coupons thereunto annexed, that the Saint Paul and Pacific Railroad Company, its successors or assigns, shall and will well and truly pay the said bonds, and each of them, and all interest to accrue upon the said bonds, or any of them, when the same shall become due, or cause the same to be paid unto the parties entitled thereto, according to the tenor of said bonds, respectively, and of the respective coupons thereunto annexed: but nothing herein contained shall impair or in any manner whatsoever affect the

liability of the First Division of the Saint Paul and Pacific Railroad Company, upon the said bonds and coupons, to the holders thereof.

And this indenture further witnesseth, that for and in consideration of the premises, and of the sum of one dollar to it duly
447 paid as aforesaid, the said party of the first part to these presents, in order the better to secure the payment of the principal of the said bonds, and all interest thereon as the same shall become payable, according to the tenor of said bonds and the terms of the coupons thereto respectively annexed, has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and transfer unto the said parties of the second part, as joint tenants, and not as tenants in common, and to the survivors and survivor of the said parties of the second part, and the heirs and assigns of such survivor, all and singular that certain branch line of railroad of the said party of the first part, or which the said party of the first part is by law authorized to construct, and which is to be constructed and to run from some point at or near the town of Saint Cloud, in the county of Stearns, to the town of Saint Vincent, in the county of Pembina and the state of Minnesota, being a distance of two hundred and ninety-three (293) miles, more or less; and also all and singular that certain other line of railroad of the said party of the first part, or which the said party of the first part is authorized by law to construct, and which is to be constructed and to run from Watab, in the county of Benton, by way of Crow Wing, to Brainerd, in the county of Crow Wing, to intersect with the Northern Pacific Railroad, being a distance of fifty-five (55) miles, more or less, as contemplated by the said act of congress, approved March
448 third, 1871; together with the equipments and appurtenances of the said railroads, respectively, and the rights, privileges and franchises thereunto respectively belonging, or in anywise appertaining, or which shall or may at anytime hereafter thereunto belong or in anywise appertain.

And also all right, title and interest which said party of the first part now has, and all right, title and interest which the said party of the first part, its successors or assigns shall or may at any time hereafter acquire, by reason of the construction of said railroads, or of either or any part of either thereof, or otherwise, in, to, or concerning the lands situate, lying and being in the state of Minnesota, which are embraced, or intended to be embraced, in the grants aforesaid, or either of them, made by the Congress of the United States to the former territory and present state of Minnesota by the acts of said congress hereinbefore mentioned, or either of them, and which have been granted by said state to the party of the first part, or shall or may be granted or conveyed to the said party of the first part, its successors or assigns, to aid in the construction of the said lines of railroad, or of either or of any part of either thereof, included in the premises hereby conveyed; and it being the true intent of these presents to convey the roadbeds of the said railroads, respectively, and all tracks, bridges, viaducts, culverts, fences, depots, stations, station-houses, engine-houses, car-houses, freight-houses,

wood-houses, machine shops and other shops, and all other
449 structures, buildings and materials whatsoever, placed and to be placed on the said railroads, respectively, or on either or any part of either thereof, or acquired or to be acquired for the use of the same, and also all locomotives, tenders, passenger, baggage, freight, cattle and other cars, and all other rolling stock whatsoever, and all machinery, tools, implements, fuel, and materials for constructing, operating, repairing or replacing the said railroads, or either or any part of either thereof or any of the equipments or appurtenances of the said railroads, or of either or any part of either thereof, and all property, rights and privileges whatsoever appertaining to the said railroads, or to either or any part of either thereof, now held by the said party of the first part, or hereafter to be acquired by the said party of the first part, its successors or assigns; together with all and singular the tenements, hereditaments and appurtenances to the said railroads, lands and premises, or any part thereof, belonging or in anywise appertaining; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part in, to and concerning the same, and each and every part and parcel thereof, with the appurtenances.

To have and to hold the said railroads, lands and premises unto the said parties of the second part, as joint tenants, and not as tenants in common, and unto the survivors and survivor of the said parties of the second part, and the heirs and assigns of such survivor, forever; but in trust, nevertheless, to and for the uses and
450 purposes, and with the powers and authorities hereinafter mentioned and set forth, that is to say:

Article First. Until default shall be made by the said First Division of the Saint Paul and Pacific Railroad Company, its successors or assigns, in the payment of either the principal or interest of the said bonds, or of some one of them, the said party of the first part, its successors and assigns, shall be suffered and permitted to remain in the actual possession of the said railroads and premises, and to operate, manage and carry on the business of the same; provided always that all the net earnings and income of or from the said railroads and premises shall, in each and every year of the said bonds, or any of them, remain outstanding be paid over as fast as realized to the trustees under these presents, to be by the said trustees used and applied semi-annually, first, in and to the payment of the interest on said bonds, and secondly, in and to the redemption of the principal thereof in the manner hereinafter set forth, until all the said bonds shall have been fully paid and satisfied, or an amount sufficient to pay and satisfy the same paid over to the said trustees.

Article Second. In case default shall be made in the payment of any interest to accrue on any of the aforesaid bonds issued or to be issued by the First Division of the Saint Paul and Pacific Railroad Company, when such interest shall become payable according to the tenor of such bond, or the terms of any coupon thereto an-
451 nexed, and such default shall continue for the period of three months; or in case default shall be made in the payment of

the principal or any of said bonds, or in case default shall be made in the observance or performance of any other matter or thing in these presents mentioned and agreed or required to be observed and performed by the party of the first part, its successors or assigns, or by the said First Division of the Saint Paul and Pacific Railroad Company, its successors or assigns, and such default shall continue for the period of six months, then and from thenceforth, and in either of such cases, it shall be lawful for the said parties of the second part, being trustees under these presents, or for the survivor or survivors of said trustees, or their or his successors or successor, personally, or by their or his attorneys or agents, to enter into and upon all and singular the railroads and premises hereby conveyed, or intended so to be, or any part thereof, and from thenceforth to have, hold, possess and use the said railroads and premises, and each and every part and parcel thereof then subject to the lien of these presents, operating and conducting the business of the said railroads, respectively, by their or his superintendents, managers, receivers and servants, or other attorneys or agents, and making, from time to time, all repairs and replacements, and such useful alterations, additions and improvements thereto as may seem to them or him to be judicious; and to collect and receive all tolls, fares, freights, incomes, rents, issues and profits of the same,
452 and of every part thereof; and, after deducting the expenses of operating the said railroads, respectively, and conducting the business thereof, and of all the said repairs, replacements, alterations, additions and improvements, and all payments which may be made or may be due for taxes, assessments, charges or liens, prior to the lien of these presents, upon the said premises, or any part thereof, as well as just compensation for their or his own services, and for the services of such attorneys and counsel as shall have been by him or them employed, to apply the moneys arising as aforesaid to the payment of interest on the said bonds, in the order in which such interest shall have become and shall become due, ratably to the persons holding the coupons evidencing the right to such interest.

Article Third. In case default shall be made in payment of interest on said bonds, or any of them, as aforesaid, and shall continue as aforesaid, or in case default shall be made in the payment of the principal, or any part thereof, of the said bonds, or any of them, it shall be lawful for the said trustees, or for the survivors or survivor of the said trustees, or for their or his successors or successor in the trust by these presents created, to enter into and upon all and singular the railroads and premises aforesaid, and, after such entry, or after other entry, or without entry, personally, or by their or his attorneys or agents, to sell and dispose of the said railroads, and of all and singular the property, rights and franchises hereinbefore conveyed, or intended so to be, and which shall be then subject to the
453 lien of these presents, at public auction, either in the city of New York or the City of Saint Paul, aforesaid, or at such place along the line of either of said railroads, and within the state of Minnesota, as the said trustees, or the survivors or survivor of them, or their or his successors or successor in said trust shall

designate, and at such time as they or he shall appoint, having first given notice of the time and place of such sale, by advertisement published not less than three times a week for six successive weeks, in one or more newspapers in the city of New York, and also published not less than three times in each week for six weeks in one or more newspapers in the city of St. Paul, and also in the city of London, and after such notice it shall be lawful for the said trustees or trustee to make such sale, or to adjourn the said sale from time to time, in their or his discretion, and, if so adjourning, to make the same, without further notice, at the time and place to which the same may be so adjourned, and to make and deliver to the purchaser or purchasers of the said railroads, lands and premises, or any part thereof, good and sufficient deed or deeds in the law for the same, in fee simple, which sale, made as aforesaid, shall be a perpetual bar, both in law and equity, against the said party of the first part, its successors and assigns, and all other persons claiming or to claim the said premises, or any part or parcel thereof, by, from, through or under the said party of the first part, its successors or assigns.

And, after deducting from the proceeds of such sale just
454 allowances for all expenses thereof, including attorneys' and counsel fees, and all other expenses, advances or liabilities which may have been made or incurred by the said trustees or trustee in operating or maintaining the said railroads and premises, or in managing the business thereof, it shall be lawful for the said trustees or trustee, and it shall be their or his duty, to apply the residue of the moneys arising from such sale to the payment of the principal and accrued and unpaid interest on all the said bonds which shall then be outstanding, without discrimination or preference as between principal and accrued and unpaid interest, or as between the holders of said bonds, or of any coupons issued therewith, but equally and ratably to all such bonds and coupon holders.

And it is hereby declared and agreed that the receipt of the said trustees shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase money, and that, after payment of such purchase money, and having such receipt, the said purchaser or purchasers shall not be obliged to inquire into the application of such purchase money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, misapplication or non-application of such purchase money, or of any part thereof, or be obliged to inquire into the necessity, expediency or authority of or for any such sale.

Article Fourth. At any public sale of the said railroads and property or any part thereof, whether made by virtue of the
455 power hereinbefore granted or by judicial authority, the trustees hereunder for the time then being may bid for and purchase, or cause to be bid for and purchased, the property so sold, or any part thereof, in behalf of all the holders of bonds secured by this instrument and then outstanding, in the proportion of the respective interests of such bondholders, at a reasonable price, if but a portion of said property shall be sold, and if the entire railroad and property shall be sold, then at a price not exceeding the whole

nount of said bonds then outstanding, with the interest accrued
ereon, and the expenses of such sale.

Article Fifth. In case default shall be made in the payment of
y half-yearly installment of interest on any of the said bonds,
hen such interest shall become payable according to the tenor of
d bonds, or of any coupons thereto annexed, and such installment
interest shall remain unpaid and in arrear for a period of six
onths after the same shall have been demanded, and become pay-
le as aforesaid, then and from thenceforth the principal sum of
h of the bonds aforesaid shall, at the option of the trustees here-
der, become and be immediately due and payable, notwithstand-
g that the time limited in the said bonds for the payment thereof
ay not then have elapsed; but a majority in interest of the holders
all bonds aforesaid which shall be then outstanding, and upon
which default in the payment of interest shall have been
6 made and be continuing, shall have the power, by an instru-
ment in writing under their hands and seals, or by a vote at
meeting duly convened and held as hereinafter provided, at any
me before the actual payment and acceptance of the interest in
ear, to instruct the trustees to declare the said principal due, or
waive the right so to declare, on such terms and conditions as such
ajority in interest shall prescribe; and such majority in interest
ay, by such instrument in writing, or such vote, annul or reverse
y declaration of the trustees in respect to said bonds becoming or
t becoming immediately payable; provided, always, that no act or
ission either of the trustees or the bondholders in the premises
all extend to be or be taken in any manner whatsoever to affect
y subsequent default.

Article Sixth. The trustees hereunder shall, at all times during
e continuance of the trust hereby created, have full power and au-
ority, to be exercised in their own discretion, and not otherwise,
release and convey, to any party who may be designated, in
iting, by the said party of the first part, its successors or assigns,
receive the same, or to release from the lien and operation of
ese presents, in such other manner as they may deem proper, any
rtion of the premises hereinbefore granted which may be appur-
nant to either of the said railroads, but which, in the judgment of
e said trustees, shall be unnecessary for use in connection therewith,
d which shall have been acquired or held for stations depots,
shops, or other buildings, or for a supply of fuel, gravel, or
7 other material, and also to convey or release as aforesaid, on
like request, any lands not occupied by the track, which may
come disused by reason of a change of the location of any station-
use, depot, shop, or other building connected with either of the
d railroads, and such lands occupied by the track and adjacent
such station-house, depot, shop, or other building as the said party
the first part, its successors or assigns, may deem it expedient to
use or abandon by reason of such change; and they may consent
any changes in the location of any depot or other building which,
their judgment, shall have become expedient, and make and de-
er the instruments necessary or proper to carry the same into

effect; provided, always, that any and all lands and premises which shall be acquired for permanent use in substitution for any so released shall be conveyed to the trustees, upon the trusts of these presents, and that the proceeds of any and all lands and premises for which others shall not within a reasonable time be required shall be paid over to the said trustees, to be by them applied to the payment of interest on and invested in the purchase of the bonds aforesaid, in the manner hereinafter provided, which bonds shall, when so purchased, be canceled and surrendered to the party of the first part, its successors or assigns, and the trustees shall also have full power to allow the said party of the first part, its successors or assigns, from time to time, to dispose, according to its or their discretion, of such portions of the equipment, machinery and implements which
458 shall be at any time held or acquired for the use of either of the said railroads, but which shall have become unfit or unnecessary for such use; it being provided, however, that any and all new or other equipment, machinery and implements which may be acquired in substitution for any so released shall, by virtue and force hereof, become and be, immediately upon the acquisition of the same, subject to the lien and operation of these presents, without any new conveyance or transfer or other act or ceremony whatsoever; and the proceeds of all sales of equipment or other personal property which may not be re-invested in new equipment, machinery or implements for use upon or in connection with said railroad shall be paid over to the said trustees, to be by them applied as hereinafter provided in regard to the proceeds of the sales of lands.

Article Seventh. The said party of the first part, its successors or assigns, shall and will, as soon as conveniently practicable after the date hereof, cause all and singular the lands granted as aforesaid to aid in the construction of said railroads to be carefully valued and appraised by one or more competent persons, in convenient sections, divisions or parcels, for sale to emigrants and actual settlers, and in such appraisement any and all lands containing or supposed to contain coal or iron or any valuable mineral substance shall be distinguished from those which are classed as agricultural or pastoral, and shall cause a full and accurate list and description of said lands
459 and premises containing, opposite each appraised section, division or parcel, the value put upon the same, to be deposited with each of the said trustees certified under the hands and seals of the appraisers, which appraisement shall be subject to the approval of said trustees, or a majority of them, and such statement and appraisal may, with the consent of them, or a majority of them, be from time to time revised, altered and corrected, a statement being in each case filed as aforesaid; and the said party of the first part, its successors or assigns, may at any time, in its or their own discretion, and not otherwise, contract for the sale of any section, division or parcel of said lands so appraised, at a price not less than the appraised value thereof, according to the last preceding statement of such value filed with said trustees, and approved by them, or any two of them, as aforesaid, and shall be entitled to have such section, division or parcel of said lands released from the lien hereof, upon the payment

to the said trustees of the purchase money of the same, not less than such appraised value thereof; and the said trustees, or any two of them, are hereby authorized and empowered, upon the sale as aforesaid of any such section, division or parcel of said lands, and the payment of the purchase money thereof as aforesaid, to release and convey to such purchaser or purchasers, or his or their heirs or assigns, the premises so sold, and thereby to discharge the same from the lien and operation of these presents, and the trusts hereby
460 created; provided, always, that no section, division, piece or parcel of said lands shall at any time be sold or released as aforesaid below the appraised value thereof, without the consent in writing of all the trustees first had and received to such sale.

And it is hereby further declared and agreed that any of the lands aforesaid may be sold, as in this article above provided, wholly or partly on credit, provided that in any and every case of sale wholly or partly on credit, and to whomsoever the sale may be made, the purchaser shall not receive a conveyance of the premises sold, or any part thereof, until payment in full of the purchase money, but may have delivered to him a contract in evidence of his purchase, unless for any special reason it shall be expedient, in the judgment of the said trustees, or any two of them, to accept from such purchaser a purchase money bond and mortgage for the amount remaining unpaid, in which case the said trustees, or any two of them, may release the said premises to such purchaser, upon receiving from him the cash portion of such purchase money, and his personal bond for the unpaid purchase money, conditioned in double the amount of the said unpaid purchase money for the payment of the same, in installments or otherwise, within a period of not exceeding five years from the date of such purchase, with interest thereon payable semi-annually.

And it is hereby expressly declared and agreed that any and all of the bonds aforesaid issued or to be issued by the said First
461 Division of the Saint Paul and Pacific Railroad Company as aforesaid, and the payment whereof is intended to be hereby secured, shall be payable and receivable at the par value thereof, including the interest then accrued thereon, on account and in payment of the purchase money of any section, division, piece or parcel of said lands which shall be sold as aforesaid; and said bonds shall, in such payment, be deemed and accepted as equivalent in all respects, dollar for dollar, of the principal and accrued interest thereof, to the same nominal amount in cash.

Article Eighth. It is hereby declared and agreed that, for the purpose of granting and releasing from the lien of these presents such of the lands and premises aforesaid as shall or may be sold in conformity with the last preceding article of these presents, the said trustees, respectively, may act, and they are hereby severally and respectively authorized and empowered to act, by agent or attorney; and all instruments executed and acts done by the agent or attorney of any of said trustees, duly appointed for that purpose, in respect to the conveyance or release of lands which shall be sold in conformity with said article, shall be as valid and effectual to all intents

and purposes, if the same be within the scope of authority of such agent, as if the same were executed by the trustee appointing such agent in person; provided, that every such power of attorney may be revoked by the trustee giving the same, at his pleasure, at any time before the execution of the authority therein granted,
462 and that each of the said trustees may remove at pleasure any agent by him appointed; and provided, further, that nothing herein contained shall be construed to prevent the said trustees from uniting on any one or more persons as such agent or agents.

Article Ninth. The trustees, or any two of them, shall be authorized to allow reasonable compensation to any agents appointed by them as aforesaid, and to such clerks and assistants, if any, as they may deem necessary to employ, or as they may deem it necessary or proper for the said company to employ, in regard to the sale of said lands, as in article seventh provided, and the preparation of contracts and conveyances thereof; and they may from time to time allow to be deducted out of the proceeds of land so sold an amount sufficient to defray such expenses, if in their judgment such expenses be reasonable and proper, and in just proportion to the benefit derived by this trust from sales of the said land; provided, always, that the holders of the bonds hereby secured shall not, nor shall the said trustees, or either of them, become or be in any manner whatsoever personally liable or responsible for, or in respect to, any such liabilities or expenditures.

Article Tenth. The net earnings and income of or from the said railroads and premises, and the net proceeds of any and all sales, which shall or may be made by the said party of the first part, its successors or assigns, of the lands aforesaid, granted or to be granted, as aforesaid, for the purpose of aiding in the construction
463 of the said railroads, or in the construction of either or of any part of either thereof, are hereby inviolably pledged to and for the payment of the interest on the bonds aforesaid, as such interest shall become due, and to and for the redemption of the principal of said bonds, in the manner hereinafter mentioned; and the trustees, for the time being, under these presents, shall and may, semi-annually, use and apply the said net earnings and income, and the said net proceeds of the sale of lands—the said net earnings and income being the primary fund—in and to the payment of interest on the said bonds, as such interest shall become due. And if, after the payment in full of any semi-annual installment of interest on said bonds, a surplus of the said moneys shall remain in the hands of the said trustees, they shall and may use and apply the same in and to the purchase of said bonds at the lowest price or prices, not exceeding a premium of ten per centum over the par value thereof, at which the said bonds may be offered for sale to the said trustees; but preparatory to such purchase of bonds, in any semi-annual period in which the said trustees shall have funds in their hands applicable thereto, the said trustees shall, except in cases where, in their judgment, the amount of bonds which such funds would purchase shall make it inexpedient to incur the expense, give public notice by advertisement in two newspapers of good circulation, in

their judgment, published in the city of New York, and one newspaper published in the city of London, at least three times a
464 week for two successive weeks, of their desire to receive proposals for the sale to them of the said bonds, to such an amount as the said funds in their hands may suffice to purchase; and, after the expiration of the two weeks from the last publication of such notice, they shall apply the said funds to the purchase of said bonds at the lowest price or prices at which they may be offered, without discrimination or preference between the bondholders offering the same for sale; provided, however, that if the said bonds shall at the time being quoted on the stock exchange, and have a known market value in New York or London, and such market value shall be lower than any price at which the said bonds may be offered pursuant to the notice aforesaid, the said trustees may purchase the said bonds at the stock exchange in either city, instead of from parties sending proposals to sell pursuant to such advertisement.

And provided, further, that if the said trustees shall be unable to obtain said bonds at the rate or premium aforesaid they may be authorized by the said party of the first part to offer and pay therefor, in their discretion a higher rate or premium, or to invest the moneys applicable to the purchase thereof in United States bonds and securities, until the bonds hereby secured can be obtained by them at the premium of ten per cent. aforesaid, over the par value thereof, or at such higher rate or premium as the said party of the first part shall authorize the said trustees to pay therefor.

And it is hereby further agreed and declared, that all
465 moneys coming into the hands of the said trustees as aforesaid, for the purposes of this trust, shall be deposited and kept by them in one or more trust companies or banking houses or institutions of credit and responsibility, and at interest, for the benefit of this trust, and the sinking fund hereby created, whenever such interest shall be reasonably obtainable thereon, until the same shall be required for use, and be used by the said trustees in the manner and for the purpose aforesaid; and that all reasonable and proper expenses incurred by the said trustees in regard to the payment of interest or the purchase of bonds as aforesaid, or in otherwise carrying out the provisions of this article, according to the true intent and meaning thereof, may be defrayed by the said trustees out of the said trust funds.

The trustees shall, without unreasonable delay, cancel the bonds so redeemed by them, and surrender the same to the said party of the first part, its successors or assigns; and they and the said party of the first part shall keep separate registries of all bonds so redeemed; and the registry of the company, showing the numbers and amounts of the bonds so redeemed, shall be at all reasonable hours and times open to the inspection of the several holders of the bonds hereby secured, as well as of the said trustees, and the numbers and amounts of all bonds redeemed in each year shall be stated in the annual report to be made by the directors of the said company for such year to the stockholders thereof.

466 Article Eleventh. The First Division of the St. Paul and Pacific Railroad Company shall hereafter keep, at its transfer office or agency in the city of New York, and also at its London agency, an appropriate book for the transfer of said bonds; and shall also keep, at the same places, a certain other book, to be designated as the register of first mortgage bondholders; and any and every holder of bonds secured hereby shall be entitled to have his name and address, and the denomination and number of any of the said bonds held by him, entered in such register, upon presenting at the aforesaid office or agency a written statement of the said particulars, signed by himself, and, if required, duly verifying his title to said bonds by the production thereof; or upon the written order of the person last registered as the holder. The registration of the name and address of each bondholder, and the denomination and numbers of the bonds by him held, upon such book, either in New York or London, shall be evidence of the right of the person so registered to vote as a bondholder, or do any other act which by these presents a bondholder is declared or may be entitled to do in respect to the bonds so registered. Each of the trustees shall have free access, at all reasonable hours and times, to such bond registry, and shall, from time to time, on request in writing, be furnished with a copy thereof by the said company. Meetings of the said first mortgage bondholders may be called in the manner hereinafter provided, or

467 in such other mode as may be fixed by regulations prescribed or established by the bondholders; and the bondholders may vote at such meetings in person or by proxy; and the quorum may be defined, and such other regulations or by-laws in respect to such meetings may be from time to time established, altered, or repealed by the bondholders, acting by the majority in interest as to them shall seem expedient; and until the bondholders shall act, such powers may be exercised by the trustees; and the said trustees, and each of them, shall have the right to require that any act or resolution of the said bondholders affecting the duties of said trustees shall be authenticated by the signatures of all the persons assenting thereto, as well as by the minute of the proceedings of the meeting.

Article Twelfth. The said party of the first part shall at all times keep at its principal office and at its agencies, in the cities of New York and London, respectively, a record of all the sales of lands which shall be made as aforesaid, and of the prices paid for the same, and the manner in which the purchase money shall have been paid or secured, and of the amount, denomination and numbers of the said bonds (if any) surrendered on account thereof, which record shall at all reasonable hours and times be open to the inspection, with the right to copy therefrom, of any and all holders of the bonds hereby secured; and the said trustees, or a majority of them, shall semi-annually, to-wit in the months of January and July in each

468 year, file in the said office a statement of the lands which shall have been by them released from the lien of these presents during the six months last preceding the time of filing such statement, and of the consideration received by them

therefor, and of the disposition made of the same, which statement of said trustees shall also be at all reasonable hours and times open to the inspecton of said bondholders, with the right to copy therefrom as aforesaid.

Article Thirteenth. In case default shall be made in the payment of any semi-annual installment of interest to accrue on any of the said bonds, and if such interest shall remain unpaid and in arrear for the period of six months, or in case default shall be made in the payment of the principal of any of the said bonds, then, and in either and every such case, it shall be the duty of the trustees under these presents, upon a requisition to them in writing, signed by the holders of not less than one-third of the whole amount of said bonds then outstanding, and upon adequate indemnity against all costs, expenses, and liabilities to be by said trustees incurred, to proceed to enforce the rights of the bondholders under these presents, either by the exercise of the powers granted by articles second and third of these presents, or by a suit or suits in equity or at law, in aid of the execution of such powers or otherwise, as the said trustees, being advised by counsel learned in the law, shall deem most effectual to enforce such rights; it being understood and hereby expressly declared that the rights of entry and sale hereinbefore granted are in-
469 tended as cumulative remedies, additional to all other remedies allowed by law, and that the same shall not be deemed in any manner whatsoever to deprive the said trustees, or the beneficiaries under this trust, of any legal or equitable remedy by judicial proceedings consistent with the provisions of these presents, according to the true intent and meaning thereof.

And it is hereby further declared and agreed that in case any trustee hereunder shall, in violation of the terms of this article, refuse to proceed, or unreasonably delay in proceeding, to enforce the rights of bondholders, upon requisition and indemnity as above provided, any or either of the other trustees may proceed to enforce such rights in the manner hereinbefore specified, and to exercise all the powers and authorities in that behalf hereinbefore granted, as validly and effectually as if the trustee so refusing or unreasonably delaying had joined in the enforcement and exercise of the same: provided, always, and it is hereby expressly declared and agreed, that no holder of bonds secured to be paid hereby shall have the right to institute any suit or proceeding, in law or equity, for the foreclosure of this indenture, or the execution of the trusts thereof, without first giving notice in writing to said trustees of default having occurred, and requesting them, and affording them a reasonable opportunity, to institute such suit or proceeding in their own name, or to proceed to exercise the powers hereinbefore granted, and offering to them adequate indemnity against the costs and ex-
470 penses of such suit or proceeding; and such notification, request, and offer of indemnity is hereby declared to be a condition precedent to any cause of action for the foreclosure, thereof, or the appointment of a receiver hereunder.

Article Fourteenth. It is mutually understood and agreed by and between the parties to these presents, and it is hereby declared that

the word "trustees" as used, and whenever the same may occur in this indenture, is intended to refer to and describe, and the same shall in all cases be construed to mean, the persons, or, in case of vacancies in the trust, the person, who for the time being shall be charged with the execution of the trusts of these presents, whether such persons or person be the said parties of the second part, or any or either of them, or successors or successor of said parties of the second part, or of any or either of them, hereunder; and in case of a vacancy or vacancies in said trust, the surviving or continuing trustees or trustee shall be competent to exercise any and all powers and authorities hereunder, hereinbefore granted to the "trustees," or to the said parties of the second part. And it is further mutually agreed and declared that each of the said trustees shall be entitled to a fair and reasonable compensation for any and all services which may hereafter be rendered by him in said trust, which compensation shall be a charge upon the net earnings of said railroads, and may be retained by the trustees out of any trust moneys coming into their hands.

471 And it is further mutually agreed that the said trustees shall not, nor shall any of them, be in any manner whatever responsible for the default or misconduct of each other in said trust, or for the default or misconduct of any agent or attorney appointed pursuant to these presents, if such agent or attorney be selected with reasonable care, or for anything whatever, in respect to said premises or the trusts hereby created, except personal misconduct or gross negligence in the execution of said trusts.

And it is further mutually agreed that the said trustees, or any or either of them, may resign the trust hereby created, and be discharged from all further duty thereunder, upon giving three months' notice in writing to the said party of the first part, and calling a meeting of the bondholders, or upon such shorter notice as the said party of the first part and a majority in interest of the said bondholders may accept as sufficient; and also that the said trustees, or any or either of them, may be removed from office by the vote of a majority in interest of the holders of the said bonds, the said vote being had at a meeting of the said bondholders duly held, and being attested by an instrument in writing under the hands and seals of the persons so voting; and that in case at any time hereafter either of the said trustees, or any trustee hereafter appointed, shall die or resign or be removed as herein provided, or by a court of competent jurisdiction, or shall become incapable or unfit to act in the

472 said trust, a successor to such trustee may be appointed by the holders, for the time being, of a majority in interest of the said bonds, then outstanding, at a meeting of said bondholders, to be duly convened and held in conformity with the provisions of these presents.

And it is further mutually agreed and declared that, in case any trustee hereunder shall die or resign, or be removed as herein provided or otherwise, or become *non compos mentis*, or otherwise legally incapable or unfit to act in said trust, all his powers and authorities

shall, if there be any of his associate trustees continuing in office, vest in such associate trustees or trustee, subject to the provisions of these presents, until the appointment of a successor to such trustee; and that, upon the appointment of a successor to such trustee, such successor shall by force of these presents, and without any further assurance or conveyance, become vested with and entitled to exercise any and all powers and authorities, which such trustees so dying, resigning, being removed, or becoming *non compos mentis*, or otherwise legally incapable or unfit to act in said trust, was vested with or entitled to exercise at the time of his decease, resignation or removal, or of his so becoming *non compos mentis*, or legally incapable or unfit to act as such trustee; but nevertheless, in case of resignation or removal, the trustee so resigning or being removed, and, in case of the death of a trustee, the surviving trustee, shall, if so required by a majority in interest of said bondholders, or by the new trustee who may be appointed, execute, acknowledge and deliver to
473 him a good and sufficient deed or other instrument, to vest in him all the powers and authorities which were possessed by his predecessor in said trust as aforesaid, under or by virtue of these presents; provided, nevertheless, that in case it shall prove, after reasonable exertions, to be impracticable to appoint a trustee in the manner aforesaid, and that the appointment of such new trustee shall be inconveniently or unreasonably delayed, and that such vacancy in said trust shall continue for the period of ninety days after the existence of the same shall have been made known to any meeting of said bondholders, and to the said party of the first part, it shall be competent for any holder or holders of said bonds to the amount of not less than five hundred thousand dollars, to apply to any court of competent jurisdiction for the appointment of a new trustee to fill such vacancy, upon such reasonable notice to the parties interested, including the said party of the first part, as the said court may prescribe; and any trustee lawfully appointed upon such application shall become vested with and be subject to the same powers and authorities as if appointed by the said bondholders in the manner aforesaid.

And it is hereby further expressly declared and agreed that, whenever and as often as any contingency shall arise in which the action of a majority in interest of the holders of said bonds shall be necessary, or in which the said bondholders are herein declared to have any discretionary voice or power, it shall be the duty of the
474 said trustees, and they or a majority of them shall be, and they are hereby authorized and required to call a meeting of all the holders of bonds secured hereby, to be held in the city of New York, by advertisement (the expenses whereof shall be a liability of said party of the first part hereunder, and may be defrayed if necessary from the trust funds) to be published three times in each week for six weeks in at least two newspapers of good circulation amongst the business community in said city, and one newspaper in the city of London, or the said meeting may be called in such other manner as may be prescribed for the convening of meetings

of said bondholders, pursuant to the provisions of this instrument; and in default of such meeting being called by the said trustees, or a majority of them, within thirty days after notification in writing to them by any bondholder of the necessity therefor, it shall be competent for any holder or holders of said bonds to the aggregate amount of five hundred thousand dollars to call said meeting in the manner aforesaid; and at such meetings so convened the holders of said bonds shall be competent to exercise, in person or by proxy, all the powers and authorities conferred upon them by these presents.

Article Fifteenth. The First Division of the Saint Paul and Pacific Railroad Company having contracted, as aforesaid, to construct and equip said railroads, and it being contemplated by the said party of the first part to lease said railroads to the said company for a term of ninety-nine years, it is hereby expressly
475 provided, agreed, and declared that any and every such lease shall be in all respects subject to these presents, and to the due enforcement and execution thereof, and to all and singular the powers, rights, and trusts herein contained; and it is hereby further provided, agreed and declared that any and all rolling stock, equipment, and materials whatsoever which, pursuant to such lease or otherwise, shall or may be acquired or furnished for the use of the said railroads, or either of them, by the said First Division of the Saint Paul and Pacific Railroad Company, shall, by the mere acquisition thereof for such use, become and be part and parcel of the property hereinbefore granted, and become and be subject, in all respects, to the lien and operation hereof, in the same manner, and with the same effect, as if such property had been acquired by the said party of the first part hereto for such use.

Article Sixteenth. If the said First Division of the Saint Paul and Pacific Railroad Company, or the said party of the first part, or the successors or assigns of either of said companies, shall well and truly pay the principal of each and every of said bonds, when the same shall become payable, and all interest thereon, as such interest shall from time to time mature, according to the tenor of such bonds, respectively, and the terms of the several coupons thereto annexed, and shall well and truly do and observe every other matter and thing provided or mentioned in these presents to be by them, respectively, done and observed, then and in that case all
476 the estate, right, title and interest of the said parties of the second part, and of the survivors and survivor of them, and of their and his successors and successor in the trust by these presents created, shall cease, determine and become void; otherwise the same shall remain in full force and virtue.

And the said party of the first part, for itself, its successors and assigns, in consideration of the premises and of one dollar to it duly paid by the said parties of the second part, the receipt whereof is hereby acknowledged, hereby covenants and agrees to and with the said parties of the second part, and their successors in the trust created by these presents, that whenever and as often as the said party of the first part, its successors or assigns, shall hereafter acquire

any lands from the government of the United States, or from the state of Minnesota, by reason of the construction of the railroads hereinbefore granted, or of either or any part of either thereof, or shall acquire any other property, rights, franchises, or things whatsoever pertaining to or for use upon the railroads hereinbefore granted, or either or any part of either thereof, the said party of the first part, its successors and assigns, shall and will acquire, possess and hold the same, and every part and parcel thereof, upon and subject to the trusts of this indenture, until conveyance thereof, in pursuance of the covenant next hereinafter contained, shall be duly made and delivered to the said parties of the second part,
477 or their successors in the trust by these presents created.

And the said party of the first part, for itself, its successors and assigns, hereby covenants and agrees to and with the said parties of the second part, and their successors in the trust created by these presents, that the said party of the first part, its successors and assigns, or the said First Division of the St. Paul and Pacific Railroad Company, its successors or assigns, shall and will diligently and faithfully use and apply the net proceeds of the negotiation of said bonds, or such of them as shall be negotiated, to the construction and equipment of said railroads, and shall and will, in each and every year ensuing the date hereof, pay over to the trustees under these presents the net earnings and income *to* from time to time derived from said railroads, or either of them, to be by the said trustees used and applied in and to the payment of the interest accruing in such year on said bonds and the redemption of the principal of said bonds in the manner hereinbefore, to-wit, in article tenth of these presents provided, until all said bonds shall be fully paid and satisfied, or an amount sufficient to pay and satisfy the same as aforesaid, paid over to the said trustees; and that the said party of the first part, and the said First Division of the St. Paul and Pacific Railroad Company, and their respective successors and assigns, shall and will, from time to time, and at all times hereafter, and as often as thereunto requested by the trustees under this indenture, execute, deliver and ac-
478 knowledge all such further deeds, conveyances, and assurances in the law, for the better assuring unto such trustees, upon the trusts herein expressed, the railroads aforesaid, together with their equipments, appurtenances and franchises, and all and singular the lands, property and things hereinbefore mentioned or described, and granted or conveyed, or agreed to be granted or conveyed, to the said parties of the second part, or their successors in the trust created by these presents, as by the said parties of the second part, or their successors in the trust hereby created, or by their counsel learned in the law shall be reasonably advised, devised or required.

In witness whereof, the said party of the first part has caused its corporate seal to be hereunto affixed, and the same to be attested by the signatures of its president and secretary, and the said parties of the second part, for the purpose of evidencing their acceptance of

this trust, have hereunto set their hands and seals the day and year first above written.

EDMUND RICE,
President of the St. Paul & Pacific Railroad Company.
[SEAL.] WALTER HINCHMAN,
Secretary of the St. Paul & Pacific Railroad Company.
HORACE THOMPSON. [SEAL.]
GEORGE L. BECKER. [SEAL.]
WM. G. MOORHEAD. [SEAL.]

479 Signed, sealed and delivered in presence of
CHARLES NETTLETON,
JAS. P. SINNOT,
As to the Signature of W. H.:
G. L. B., and W. G. M.
EDWD. D. ATWATER,
HERMANN TROTT,
As to the Signature of Mr. Rice and Mr. Thompson.

(Duly acknowledged.)
(Duly certified by Secretary of State of Minnesota.)

DEFENDANT'S EXHIBIT 33.

Whereas in and by a certain decree made and entered on the 11th day of April, 1879, in a certain suit pending in the Circuit Court of the United States for the District of Minnesota, sitting in Equity wherein Jacob S. Wetmore, Thomas W. Pearsall and Thomas Denny as trustees are complainants and the Saint Paul & Pacific Railroad Company, The First Division of the Saint Paul & Pacific Railroad Company, George L. Becker, Horace Thompson, William G. Moorhead and Charles A. F. Morris, are defendants, which said suit was brought to foreclose a certain mortgage, or deed of trust, bearing date the first day of April, A. D. 1871, executed by said defendant corporation, The Saint Paul and Pacific Railroad Company to the defendants Horace Thompson, William G. Moorhead and George L. Becker, as trustees, upon all and singular, certain property, premises, rights, immunities and franchises in said decree specified
480 and hereinafter described to secure certain mortgage bonds, issued and negotiated by said defendant the First Division of the Saint Paul & Pacific Railroad Company, bearing even date with said mortgage or deed of trust to the aggregate amount of fifteen millions of dollars as found and adjudged in said decree, and for a more full description of which said mortgage or deed of trust, reference is hereby made to said decree and to the bill of complaint in said suit, it was among other things adjudged and decreed, that all and singular the said property, premises, rights, immunities and franchises, so described in and covered by, the said mortgage or deed of trust, be sold at public auction by or under the direction of the undersigned, H. E. Mann, one of the Masters of said Court, at the

eastern front door of the United States Custom House building, where said court holds its session, in the city of Saint Paul and District of Minnesota, aforesaid.

That the same be sold in one parcel and as one entire property to the highest and best bidder (but not for less than one million five hundred thousand dollars), that the said Master give public notice of the time and place of such sale, according to law and the course and practice of said Court and make report thereof to the court, and that upon the payment of the purchase money as in said decree provided and the confirmation of such sale by the court the said Master should execute and deliver a certificate or deed of conveyance of the premises to the purchaser or purchasers thereof.

481 And whereas, pursuant to the said decree, I, as such Master did give due and legal public notice of the sale of said premises as provided in said decree by causing a notice, containing the specifications required by law and setting forth the terms and conditions of sale embodied in said decree and the savings and exceptions therein provided, and stating that the said premises would be sold at public auction to the highest and best bidder, at the eastern front door of the United States Custom House building, where the said *said* court holds its sessions, in the city of Saint Paul and District of Minnesota, aforesaid, on the 14th day of June, 1879, at eleven o'clock in the forenoon of that day, by me as such master to be published once in each week for six weeks, successively prior to the time in said notice named for such sale in a newspaper printed and published in the city of Saint Paul in said District, called *the* "The Daily Globe."

And whereas, I as said Master did also give notice in one newspaper published in each of the cities of Amsterdam and Rotterdam in the Kingdom of the Netherlands, of the time, place and terms of said sale, of the application to be made of the purchase money and of the reservation in said decree made in favor of outstanding bondholders as in said decree provided.

And whereas all and singular the said property and premises so advertised for sale and hereafter specifically described, were pursuant to said notice, and at the time and place therein specified, to-wit: on the 14th day of June, 1879, at eleven o'clock in the

482 forenoon at the eastern front door of the United States Custom House building where the said Court holds its sessions in the city of Saint Paul and District of Minnesota, aforesaid, by me duly struck off and sold, as one entire property, and in one parcel to "The Saint Paul, Minneapolis and Manitoba Railway Company," a corporation duly constituted and organized under the laws of the state of Minnesota, for the sum of one million six hundred thousand dollars, the said corporation being the highest and best bidder therefor and that being the highest sum bidden for the same.

To all which facts and matters hereinabove recited I do hereby certify.

And whereas I have duly made my report of said sale, and of all proceedings thereon to said court as required by said decree and my

said report has been in all things duly confirmed by the Court whereby the said purchaser has become entitled to a proper certificate of sale or conveyance of the said property and premises as in said judgment and decree provided.

Now Therefore, this presents witness: That I, the said Horatio E. Mann, Master in Chancery as aforesaid, by virtue of the power and authority in me vested as such Master and pursuant to said decree, in consideration of the premises hereinbefore recited and of the said sum of one million six hundred thousand dollars to me in hand paid by the said "The Saint Paul, Minneapolis & Manitoba Railway Company the receipt whereof is hereby acknowledged, have
483 struck off and sold as aforesaid and do hereby grant and convey unto the said The Saint Paul, Minneapolis & Manitoba Railway Company and to its successors and assigns forever, all and singular the said property and franchises so struck off and sold as aforesaid to the said last named corporation to-wit: all and singular the line of railroad of the said corporation, The Saint Paul & Pacific Railroad Company, extending from a point at or near the town of Saint Cloud, in the County of Stearns, to the town of Saint Vincent, in the county of Kittson, and State of Minnesota; and also all and singular the line of railroad which said defendant corporation, The Saint Paul & Pacific Railroad company, was authorized to construct in said State, from Watab, in the County of Benton, by way of Crow Wing, to the town of Brainerd, in the county of Crow Wing, to intersect with the Northern Pacific Railroad at said town, as contemplated by the Act of Congress, approved March 3d, 1871, in the bill of complaint in said suit named, together with the equipments and appurtenances of the said Railroads respectively, and the rights, privileges and corporate and other franchises thereunto respectively belonging or in any wise appertaining, or which shall or may at any time hereafter thereunto belong or in any wise appertain; and also all right, title and interest which said defendant, The Saint Paul and Pacific Railroad Company, has now, or hath heretofore had or that it or its successors or assigns may at any time hereafter acquire by reason of the construction of said Railroads, or of either, or
484 any part of either thereof, or otherwise, in, to or concerning the lands situate, lying and being in the State of Minnesota, which are embraced or intended to be embraced in the grants, or either of them, made by the Congress of the United States to the former Territory and present State of Minnesota, by the acts of said Congress, approved March 3d, 1857, March 3d, 1865 and March 3, 1871, respectively, in the bill of complaint in said cause named and which has been granted by said State to said last named railroad company, or which shall or may be granted or conveyed to it, its successors, or assigns, to aid in the construction of the said lines of railroad, or of either or of any part of either thereof, and all and singular, the roadbeds of the said railroads, respectively, and all tracks, bridges, viaducts, culverts, fences, depots, stations, station houses, engine houses, car houses, freight houses, wood houses, machine shops and other shops, and all other structures, buildings and materials whatsoever, placed or to be placed on the said railroads re-

spectively, or on either or any part of either thereof, or acquired or to be acquired for the use of the same, and also all locomotives, tenders, passenger, baggage, freight, cattle and other cars, and all other rolling stock whatsoever, and all machinery, tools and implements, fuel and materials for constructing, operating, repairing or replacing the said railroads, or either or any part of either thereof, or any of the equipments or appurtenances of said railroads or of either
485 or any part of either thereof now held by the said defendant corporations, The Saint Paul and Pacific Railroad Company, and The First Division of the Saint Paul and Pacific Railroad Company or either of them, or hereafter to be acquired by the said corporations, or either of them or by their successors or assigns or the successor or assigns of either of them, together with all and singular the tenements, hereditaments, and appurtenances to the said railroads, lands and premises or any part thereof, belonging or in any wise appertaining, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said defendant corporations, and of each of them, in, to and concerning the same and each and every part and parcel thereof, with the appurtenances, subject however to the terms, conditions, provisions, savings and exceptions in the said decree specified and mentioned to which for greater certainty reference is hereby made.

To have and to hold the above granted premises with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, unto the said "The Saint Paul, Minneapolis and Manitoba Railway Company," its successors and assigns forever.

In testimony whereof, as such Master, I have hereto set
486 my hand and affixed my seal this 21st day of June, A. D. 1879.

HORATIO E. MANN. [SEAL.]

Signed, sealed and delivered in presence of:
GEO. L. OTIS.
O. J. REYNOLDS.

(Duly acknowledged.)
(Duly certified by the Secretary of State of Minnesota.)

DEFENDANT'S EXHIBIT 34.

STATE OF MINNESOTA,
County of Wright:

District Court, 4th Judicial District.

THE FIRST DIVISION OF THE SAINT PAUL AND PACIFIC RAILROAD COMPANY
against
FRANK M. PARCHER, County Treasurer, and HENRY KREIS, County Auditor of the County of Wright.

The complaint of the First Division of the Saint Paul and Pacific Railroad Company, the above named plaintiff, respectfully shows to the court:

That the defendant Frank M. Parcher is, and for a long time past has been, the County Treasurer of said county of Wright:

That the defendant Henry Kreis, is, and for a long time
487 past has been, the County Auditor of said county:

And the plaintiff is a body corporate, created and existing under and by virtue of the laws and proceedings hereinafter mentioned and referred to.

That heretofore, to-wit, on the 27th day of May, A. D. 1857, the Minnesota and Pacific Railroad Company was duly organized and became a corporation under and pursuant to the provisions of an act of the Legislative Assembly of the Territory of Minnesota, entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said state,' and granting certain lands to railroad companies therein named," approved May 22d, A. D. 1857, which said act is hereby referred to, and made part of this complaint; that after such organization and within ten days from the passage of said act, to-wit, on said 27th day of May, A. D. 1857, the said Minnesota and Pacific Railroad Company, by resolution duly passed by its Board of Directors, did duly accept the said act, and a duly certified copy of such resolution was on the same day deposited and filed in the office of the Secretary of said Territory.

That said Minnesota and Pacific Railroad Company entered upon the execution of the trust by said act committed to it, and
488 commenced the survey, location and construction of the railroad which, by said act, it was authorized to build and operate, and did in fact thereafter actually construct and complete ready for placing the superstructure thereon, more than thirty miles of such railroad, and did in fact receive, Minnesota State Railroad Bonds issued and delivered to it by the Governor of the State of Minnesota, to the amount of $300,000 and more, under and pursuant

to the provisions of section ten, of article nine of the Constitution of said state, as amended on the 15th day of April, A. D. 1858, which said bonds were so issued and delivered to said company, upon evidence produced and securities given by said company, as prescribed and required in and by said section ten, of article nine, as amended as aforesaid, and in and by an act of the Legislature of said state, entitled "An act concerning land grant railroads," approved on the 12th day of August, A. D. 1858; but that no part of the said railroad had been actually completed, with the cars running thereon, on the sixth day of March, A. D. 1860, nor was any part thereof so actually completed, with cars running thereon, until after the passage of the act of said Legislature, approved March 10th, 1862, and hereinafter referred to.

That afterwards, in the year 1860, and after the passage of an act of said Legislature, approved March 6, 1860, entitled "An act in addition to 'An act concerning land grant railroads, passed Aug. 25th, 1858,'" default having been made by said Minnesota
489 and Pacific Railroad Company, in the payment of interest on the first mortgage bonds of such company, issued to and held by the state, and the trustees, under the deed of trust or mortgage by said company, given to secure such bonds, having neglected to foreclose the same, the Governor of said state did proceed to foreclose, and did in fact foreclose such deed, in conformity with the provisions thereof, and in accordance with the statute in such case made and provided, and upon the sale of the property, rights and franchises covered and embraced in said deed, upon and under such foreclosure thereof (which sale was made on or about the 23d day of June, A. D. 1860), did bid off and purchase the same for and in the name of the said state.

That afterward, and on the 8th day of March, A. D. 1861, at the request and upon the application of the said Minnesota and Pacific Railroad Company, a certain act, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad," was passed by said Legislature, and duly approved, which act is hereby referred to and made part of this complaint; that said Minnesota and Pacific Railroad Company duly accepted said act, and afterward, before the 1st day of July, 1861, paid to the state treasurer of said state the amount of legal costs and expenses incurred by said state in the foreclosure and sale aforesaid, and did deposit with the Governor of said state, as a guaranty of the good faith of said company,
490 the sum of ten thousand dollars, pursuant to the provisions of Sec. 4 of said last named act.

And said company did commence the construction of that portion of said railroad extending from Saint Paul to Saint Cloud and Sauk Rapids, as required by said act, but wholly failed to put the same or any part thereof into operation, equipped for business or otherwise, within eighteen months from the 1st day of July, A. D. 1861, and wholly failed to construct or put into operation, or equip for business, any portion of the main line of said road extending from St. Anthony via Minneapolis westwardly, or from Stillwater to St. Paul within fifteen months from the expiration of the time last

aforesaid, and wholly failed to construct, put into operation or equip for business, that portion of said main line extending from St. Paul to St. Anthony, on or before the 1st day of January, A. D. 1862.

And that at the time of the passage by the said Legislature of that certain act, approved March 10th, 1862, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act of incorporation relating thereto," which act is hereby referred to, and made part of this complaint, the said Minnesota and Pacific Railroad Company had not constructed, put into operation nor equipped for business, that portion of said main line extending from St. Paul to St. Anthony, nor any part or portion whatever of the main or branch line or lines of the said railroad.

491 And that no part of said railroad has ever been completed and put into operation and equipped for business, except by the St. Paul and Pacific Railroad Company, named in said last mentioned act, and by the plaintiff in this action.

That under and pursuant to the said act of the Legislature of said state, approved March 10th, 1862, the Saint Paul and Pacific Railroad Company was duly organized, and became and was a corporation, and succeeded to and became, and was vested with all the corporate powers and franchises, and all the rights, privileges, property, benefits, immunities and lands of, or which had theretofore pertained to, the said Minnesota and Pacific Railroad Company, upon and subject to the trusts, obligations, conditions and forfeitures prescribed and contained in said act.

And that said St. Paul and Pacific Railroad Company being so organized as aforesaid, and so vested with said powers, franchises, rights, privileges, property, benefits, immunities and lands, assumed the trusts and obligations aforesaid and took possession, and commenced the construction of said railroad, and in the month of May, A. D. 1862, did enter into a contract with certain persons, copartners, doing business under the firm name of Litchfield & Co., for the construction and equipment by said firm of that part of said railroad extending from the city of St. Paul to Watab, in the County of Benton, a distance of about eighty miles from St. Paul, excepting a portion of said road then being built for said company by

492 Winters & Drake, between the city of St. Paul and the city of St. Anthony, in and by which contract, it was provided, among other things, that the said St. Paul and Pacific Railroad Company, in part payment to said firm of Litchfield Co., for the construction and equipment of such portion of said railroad as aforesaid, should issue to said Litchfield & Co., $350,000 of the full paid capital stock of such company, and that no other issue of such capital stock should be made, except a sum not to exceed $60,000, as specified in said contract, and that payment for such construction and equipment, which included a very large amount in addition to the stock so to be issued therefor, as aforesaid, should be made to said firm from time to time as the work should progress, and in full as often as five miles of such road should be completed, and a proportionate amount of machinery should be furnished. That said

Litchfield & Co. entered upon the performance of the said contract, and fully performed the same on their part until the said railroad had been fully completed and equipped, with the cars running thereon, from St. Paul to Anoka, a distance of 30 miles, when the said St. Paul and Pacific Railroad Company became unable to perform the said contract on its part, and failed and neglected, and was unable to pay to said Litchfield & Co., the compensation to which they had become entitled, and the sums which had become due to them under said contract, for the building and equipment of said road to Anoka, as aforesaid; whereupon the said company, with a view, among other things, of becoming relieved of and from
493 its said obligations to said firm of Litchfield & Co., and other pecuniary embarassment, enabling the said Litchfield & Co. to complete and fully perform the said contract on their part without risk or loss thereby, and of securing the construction and equipment of that and other portions of said railroad did, on the sixth day of February, A. D. 1864, in pursuance of the provisions of an act of said Legislature, entitled "An act to amend the Charter of the St. Paul and Pacific Railroad Company," approved on the day last aforesaid, which had been passed at the instance of said company, which is now referred to and made a part of this complaint, create and issue to E. B. Litchfield, one of the members of the said firm of Litchfield & Co., the preferred and special stock mentioned and referred to in a certain agreement, which was afterwards and on the same day under and pursuant to the act of the Legislature last above mentioned, made and entered into by and between the said company and the said E. B. Litchfield, and the said Litchfield & Co., which said agreement is in the words and figures following, to-wit:

Agreement.

Whereas, the Saint Paul and Pacific Railroad Company did, on the 3d day of May, 1862, enter into a contract with Messrs. Litchfield & Co., of Brooklyn, in the State of New York, for the construction and equipment of the road of the Saint Paul and Pacific Rail-
494 road Company, from the city of Saint Paul to a point upon or near the Mississippi river, called Watab, a distance of eighty miles from Saint Paul, excepting that portion of said road then being built by Winters and Drake, between the city of Saint Paul and the city of Saint Anthony, upon certain conditions therein named:

And, whereas, several causes, among which are the Indian difficulties in this state, the low stage of water in the Mississippi river, and the general advance in the price of labor, of iron and other materials, have combined very largely to increase the cost of said road;

And, whereas, by the terms of said first-named agreement the said Saint Paul and Pacific Railroad Company agreed to issue to Litchfield & Co., in part payment for the constructon and equipment of the road above named, three hundred and fifty thousand dollars of the full paid stock of said company, and further agreed that no

other issue of stock should be made, except a sum not to exceed sixty thousand dollars, as was in said agreement provided;

And, whereas, by the terms of an act of the Legislature of the State of Minnesota, approved on the 6th day of February, A. D. 1864, entitled "An act to amend the charter of the Saint Paul and Pacific Railroad Company," the said company was empowered to create and issue in such manner and upon such terms as it might deem expedient, one or more classes of preferred stock and special stock, and to make such agreements as it may deem proper with the respective holders thereof, as to the dividends thereon
495 and the securities for such dividends, and to make such agreements as it may deem proper with the holders of any such special stocks, for the appropriation of the net earnings of any portion of the railroad which it may construct or otherwise acquire, to the payment of dividends on such special stock as may be issued in respect thereto, which appropriation, as made by such agreement, shall be effectual to secure to the said and future holders of such stock, the application of such net earnings as in said agreement provided against any future act of the company, or any of its general liabilities, and was authorized also to make such agreement as it may deem proper with the holders of any such special stock as to the administration of the portion of said railroad and the land grant appertaining thereto, to which said stock may pertain, and for the separate organization of the holders of such special stock for the purpose of that administration, and enabling them, or directors chosen by them, separately, or in conjunction with the other directors, to exercise in respect to the portion of the road to which such special stock may pertain, all the powers of the company, subject to the provisions of such agreements when made and entered into.

And, whereas, since the passage of said act, there has been issued by the Saint Paul and Pacific Railroad Company to E. B. Litchfield, of the firm of Litchfield & Co., aforesaid, certificates of stock for thirty-five hundred shares, of one hundred dollars per share, which said shares are created and issued under said act as preferred
496 and special stock, pertaining to that portion of the road of said company which extends from Saint Paul, in the County of Ramsey, to Watab, in the County of Benton;

And, whereas, under the provisions of said act, the said Saint Paul and Pacific Railroad Company have issued to the said E. B. Litchfield certificates of stock for five thousand shares of one hundred dollars per share, which said shares are created and issued under said acts as preferred and special stock, pertaining to that portion of the road of said company which extends from Saint Anthony to a point between the foot of Big Stone lake and the mouth of Sioux Wood river;

And, whereas, the said Saint Paul and Pacific Railroad Company are desirous of securing the completion of the lines of railroad above named with the least possible delay;

Now therefore, this agreement, made and entered into this 6th day of February, A. D. 1864, by and between the St. Paul and Pacific Railroad Company, party of the first part, and E. B. Litch-

field, of the city of Brooklyn, in the State of New York, as the owner and holder of the said preferred and special stock hereinbefore mentioned, party of the second part.

Witnesseth, that the party of the first part, in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the party of the second part, have sold and they do hereby sell, assign, transfer and set over unto the said party of
497 the second part, all the rights, benefits, privileges, property, franchises and interests of the party of the first part as a body corporate, under the laws of the Territory or State of Minnesota, belonging to that portion of the lines of said company, which extends from St. Paul, in the county of Ramsey, to Watab, in the County of Benton, a distance of eighty miles, together with the lands granted by Congress to the Territory of Minnesota for the purpose of aiding in the construction of said eighty miles of road. And all the rights, benefits, privileges, property, franchises and interests of the party of the first part as a body corporate as aforesaid, belonging to that portion of the lines of said company which extend from St. Anthony to a point between the foot of Big Stone lake and the mouth of Sioux Wood river, together with the land granted by Congress to the Territory of Minnesota for the purpose of aiding in the construction of said line of road, together with the right to extend the line of railroad from its terminus, at a point between the foot of Big Stone lake and the mouth of the Sioux Wood river, to any point on the Missouri river, north of the 45th parallel of north latitude, and to increase the capital stock equal to the full cost of said railroad and extension.

And the said party of the first part covenants and agrees with the said party of the second part that the lines of road above named are clear and free from any liability to any director of the present or any former board of directors of said company, for services performed, rights of way furnished, or any claim of any nature
498 of director or directors as aforesaid as against the Saint Paul and Pacific Railroad Company or Litchfield & Co., contractors, so far as the lines herein intended to be conferred are concerned, except certain claims for special stock upon that part of the line from Saint Paul to Watab, which are hereinafter more particularly named and set forth.

And that the said party of the first part further agrees that no stock shall be issued, nor any liabilities incurred, either general or special, by the said party of the first part, chargeable to any portion of the lines of the road herein conveyed, except for the purpose and in the manner hereinafter particularly specified.

And the said party of the first part further agrees that no transfer shall be made of any of the lands belonging to the main line for that portion of the main line from Stillwater to Saint Paul, until the full quantity of three thousand eight hundred and forty (3,840) acres per mile is secured to the party of the second part for that portion of the main line herein intended to be conveyed, excepting seventy-six thousand eight hundred (76,800) acres selected by Winters, Harshman & Drake, as follows: All the lands situated in range twenty-three, twenty-four, twenty-five (23, 24, 25) and the two

most easterly tiers of sections of range (26) twenty-six, being a length on the main line of a continuous twenty miles, and for indemnity, the lands within nine miles on each side, if so much is required, and if more is required the indemnity lands in
499 ranges (26 and 27) twenty-six and twenty-seven, or enough thereof to make the full quantity of one hundred and twenty (120) sections.

And the said party of the first part further agrees that the administration of the portions of said railroad, and the land grant appertaining thereto, shall belong solely and exclusively to the holder or holders of the special stock hereinbefore named, conjointly, as to that portion of said road which extends from Saint Paul to Watab, with the holders of stock hereinafter provided for. And that the holder or holders of such special stock may form a separate organization for the purposes of such administration, with a board of directors chosen by the holder or holders of such special stock, exercising, in respect to the portions of the road to which said special stock pertains, all the powers of the Saint Paul and Pacific Railroad Company over the lines of road hereby transferred, subject only to the provisions of this agreement.

In consideration of the foregoing agreements, entered into by the Saint Paul and Pacific Railroad Company, the said party of the second part, for himself, his heirs, assigns and successors, agrees to build and complete the lines of road herein conveyed, as required by the acts of Congress making the grant of lands in aid thereof, and as required by the acts of the Legislature of the State of Minnesota.

And the said party of the second part, for the separate organization herein contemplated, agrees to assume all liabilities of
500 the party of the first part, so far as the same *same* relates to the lines of road hereinbefore mentioned, of every name and nature, and to save the said party of the first part harmless therefrom, including the contract with Winters, Harshman & [illegible], dated March 11th, 1862, and the contract with A. B. Smith and L. G. Simmons, dated September 21st, 1863, relative to a line of telegraph along said road.

And the said party of the second part further agrees to choose, without unnecessary delay, a separate board of directors, which said board, under the name and style of "The First Division of the Saint Paul and Pacific Railroad Company," and their legal successors, it is agreed by the parties hereto shall exercise, in respect to the portions of the lines of road hereinbefore transferred, all the powers of the St. Paul and Pacific Railroad Company thereunto appertaining, subject only to the provisions of this agreement.

And the said party of the second part further agrees that said board of directors, when so organized, shall, upon the request of the persons named below, and upon the surrender of certificates of stock for a corresponding number of shares in the Saint Paul and Pacific Railroad Company, issue certificates of stock to such persons, which said shares, when so issued, shall be placed upon an equal footing with the special stock created and issued to the party of the
501 second part, upon that portion of said line from Saint Paul to Watab last above named, to-wit:

Edmund Rice, five shares	$500
R. R. Nelson, "	500
William Lee, "	500
Richard Chute, "	500
Leander Gorton, "	500
Edmund Rice, President, two hundred and sixty-one shares	26,100
E. C. Palmer, four shares	400
Alexander Ramsey, one hundred shares	10,000
Dwight Woodbury, one hundred shares	10,000
E. F. Drake, seventeen shares	1,700
Jonathan Harshman, seventeen shares	1,700
Valentine Winters, sixty-six shares	6,600

It is mutually understood and agreed by and between the parties hereto, that this sale and transfer is made subject to a contract made and entered into on the 11th day of January, A. D. 1864, between the party of the first part and the Chicago and North Western Railway Company, relative to the construction of that part of the line which extends from Saint Paul to Winona, and the consolidation of that part of said line with said Chicago and Northwestern Railway Company, and that the provisions of said contract may be carried out, and said consolidation perfected by the parties to said contract, according to the true intent and meaning thereof.

502 It is further mutually understood and agreed by and between the parties hereto that in case the said contract with the Chicago and North Western Railway Company for any reason should fail to be carried out and executed, then the party of the first part shall have the right to construct said line of road from Saint Paul to Winona, and to connect with the lines hereinbefore conveyed, upon the same terms as are in said contract expressed, or may enter into a contract containing similar provisions with any other corporation, company or person.

And it is further mutually understood and agreed by and between the parties hereto that this sale and transfer is made subject to any agreement which may be made hereafter by the party of the first part for the construction, extension or transfer of that portion of the branch line beyond Watab.

The said road from St. Paul to Watab, to transport men and materials over the same for the construction of the said line above Watab, which shall be done upon fair and reasonable rates; and no contract shall be made for such extension without an agreement which shall be binding upon the party of the second part hereto, and upon the separate organization hereinbefore provided for, and upon the party contracting for the said extension beyond Watab, that said roads shall forever run in connection with each other, and shall never contract with other competing lines for the business properly belonging to either of said lines, the true intent and meaning of such agreement to be that the running connection

503 shall be mutual and exclusive one with the other.

It is further and mutually understood and agreed by and between the parties hereto that in any arrangements hereafter made

for the said extension of said line of road beyond Watab, provisions shall be made that in case the parties interested shall fail to agree upon the terms of the running connections between the line from Saint Paul to Watab, and the extension of said line beyond Watab, the subject shall be referred to the superintendents of the respective roads, who, in case of disagreement, shall select a referee who shall be authorized to settle finally all questions in dispute.

It is further mutually understood and agreed by and between the parties hereto that upon completion of the transfer of the lines hereinbefore named, pursuant to the terms of this agreement, the Saint Paul and Pacific Railroad Company shall be relieved from all the terms and conditions of the contract between said company and Litchfield & Co., dated May 3rd, 1862, and the same shall be assumed by the organization contemplated by this agreement.

In witness whereof, the said party of the first part hath caused these presents to be signed by its President, attested by its Secretary, and its corporate seal to be hereunto attached, and the party of the second part hath hereunto affixed his hand and seal.

504 Executed at St. Paul, Minnesota, this 6th day of February, A. D. 1864, in triplicate.

THE SAINT PAUL AND PACIFIC RAILROAD COMPANY,
By EDMUND RICE, *President.*

Attest:
HENRY ACKER, *Secretary.*
[CORPORATE SEAL.]

E. B. LITCHFIELD. [L. S.]

Signed, sealed and delivered in the presence of
H. F. MASTERSON.
G. L. BECKER.

ST. PAUL, *February* 6, 1864.

The foregoing agreement is made with the knowledge and consent of Litchfield & Co., and the contracts between the Saint Paul and Pacific Railroad Company and Litchfield & Co. are modified in accordance therewith.

LITCHFIELD & CO. [L. S.]

That after the execution of the said agreement, on the same day last aforesaid, the said E. B. Litchfield assigned and transferred a portion of the stock, which had been so issued to him as aforesaid, to sundry persons who, with him the said E. B. Litchfield, did thereupon and on said same day, at the said city of St. Paul, in accordance with the provisions of said agreement, and for the purposes therein contemplated, form and organize "The First Division of the Saint Paul and Pacific Railroad Company," and did then and there elect a Board of Directors therefor, which board thereafter and on the same day did elect a president and vice president, secretary
505 and treasurer of said company; that a copy of said agreement, with a report of such organization thereunder, was filed in

the office of the Secretary of State, on the 4th day of May, A. D. 1864; that the said agreement and report and the said "The First Division of the Saint Paul and Pacific Railroad Company," are the same agreement, report and company, mentioned and referred to in an act of the Legislature aforesaid, entitled "An act to legalize and confirm the organization, acts and proceedings of the First Division of the Saint Paul and Pacific Railroad Company, and in relation to the character and powers of said company," approved February 6th, A. D. 1866, which act is hereby referred to and made part of this complaint, and that the First Division of the Saint Paul and Pacific Railroad Company, so formed and organized as aforesaid, is the plaintiff in this action.

That immediately upon such organization thereof, as aforesaid, The First Division of the Saint Paul and Pacific Railroad Company became entitled to and vested with all and singular the corporate powers and franchises, and all the rights, privileges property, benefits, immunities and lands of the St. Paul and Pacific Railroad Company, belonging or pertaining to the lines of railroad in said agreement specified, including the lands granted by Congress to the Territory of Minnesota, for the purpose of aiding in the construction of such lines, and did enter into the possession and assume and undertake the construction, completion, equipment, operation, control, administration and management of said lines of railroad,
506 and the land grants appertaining thereto, according to the said agreement, and the acts of the said Legislature and of Congress relative thereto; and did thereupon proceed with and prosecute, and have ever since proceeded with and prosecuted, the construction, completion, equipment and operation of said lines of railroad, and had and retained the administration, control and management thereof, and of the said land grants, in accordance with the stipulations of the said agreement, and with the requirements of the laws of this state, of the late Territory of Minnesota, and of the United States, relative or pertaining to said lines of railroad.

And that the said, The First Division of the Saint Paul and Pacific Railroad Company, the plaintiff in this action, long since completed all that portion of said railroad from Saint Paul to Saint Cloud, a distance of seventy-six miles, and more than ten continuous miles of the main line of said road, from a point on the constructed line in St. Anthony, by the way of Minneapolis westwardly, with regular trains of cars running thereon; and so that such regular trains have ever since been, and still are, running thereon; which completion of said road or lines the Governor of said state from time to time, as portions thereof were so completed, duly certified to the Secretary of the Interior, as authorized and required by law to do; by reason whereof a large amount of the lands so granted by Congress to the Territory of Minnesota as aforesaid, and which had been duly
507 certified to the state by said Secretary of the Interior, to-wit, seven hundred and twenty sections of said lands, became and was vested in said plaintiff, and was afterward duly conveyed to said plaintiffs and its assigns, in fee simple, by the said Governor in his official capacity, and in behalf of the state pursuant to the statute

in such case made and provided; that all and singular the lands mentioned and described in the schedule hereto attached, marked "Schedule A," which schedule is hereby referred to and made a part of this complaint, were so acquired by and conveyed to said plaintiff on or before the — day of ——, A. D. 1867, and have ever since been and still are the property of and held and owned by the plaintiff; and that all of said lands are situate in said county of Wright.

And the plaintiff further says that the act of the Legislature of said state, entitled "An act in relation to the taxation of lands granted to the Saint Paul and Pacific Railroad Company," approved March 4th, A. D. 1865, which act is hereby referred to and made part of this complaint, was duly accepted by the said Saint Paul and Pacific Railroad Company, and by this plaintiff, in the office of Secretary of State of said state, A. D. 1865.

And the plaintiff further says that nothwithstanding the said lands were so acquired, and have ever since been so held and owned by this plaintiff as aforesaid, and notwithstanding the same are by law exempt from all taxation till sold and conveyed by the plaintiff;
and notwithstanding the per centum on the gross earnings of
508 the plaintiff and of said railroad, for the year 1867, which by law the plaintiff is required to pay into the treasury of the state, has upon due demand been paid by said plaintiff into said treasury.

Yet, that in the year 1867, the assessors of the several townships and districts in said county, under and pursuant to the direction of the county auditor of said county, did assess and return the said lands to said county auditor for taxation in the same manner, at the same valuation, and to the same extent as lands subject to taxation were required to be, and were assessed and returned for that purpose, and the said county auditor, in wanton disregard and violation of the laws of this state, exempting such lands from taxation, or limiting and restricting the right and power to tax the same, and of his duty in that behalf, did assess taxes upon the said lands, and upon each and every parcel thereof, for the said year 1867, in the same manner and to the same extent as he was authorized to do, and did do, upon lands subject to taxation in said county, and did enter the several parcels of said lands with the amount of taxes so assessed upon each parcel thereof, upon the grand tax duplicate of said county for said year, and deliver said duplicate to the county treasurer of said county for collection.

And the plaintiff further says that afterward, and on the 25th day of April, A. D. 1868, the taxes so assessed upon the said lands of the plaintiff not having been paid, and the said county auditor having entered and included the same in the list of delin-
509 quent taxes for said year 1867, he, the said county auditor, did cause the list of delinquent lands in said county for said year, that is to say, a list of the lands upon which the taxes of 1867 were due and unpaid, in which list he included the said lands of the plaintiff, to be published in "The Northern Statesman," a newspaper printed and published in said county, to which list was and is

attached a notice subscribed by said county auditor, and bearing date the said 25th day of April, A. D. 1868, that the whole of the several tracts or town lots in said list contained, or so much thereof as may be necessary to pay taxes and penalty charged thereon will be sold at the court house, in said county, on the first Monday of June next, by the county treasurer of said county of Wright, unless said taxes and penalty shall be paid before that time; and that said sale will commence on said first Monday in June, at 10 o'clock A. M., and continue from day to day until all the land comprised in said list shall be sold or offered for sale.

That such list of delinquent lands, with said notice attached, has ever since been and still is published in said newspaper, and that the said county treasurer intends to, and will, unless restrained by this court, sell, or offer for sale, all and singular the lands so advertised, including the said lands of the plaintiff, pursuant to said notice.

And that said county auditor intends to and will upon such sale, unless restrained by this court, make out and deliver to the purchaser at such sale of any lands or lots sold thereat, a certificate of
510 purchase, and afterward, unless the lands so sold shall be redeemed as provided by law, a deed thereof pursuant to the statute in relation to sales of land for delinquent taxes.

And the plaintiff further says that such sale of lands of this plaintiff, or the offering of the same for sale pursuant to said notice, will greatly cloud and embarrass the plaintiff's title thereto, and endanger such title, and that if the said lands shall be sold pursuant to such notice the plaintiff will be subjected to great expense, annoyance and vexation, and to numerous suits and actions, to relieve the said lands and the title thereto from such cloud and embarrassment, and will suffer great loss and damage therefrom.

That such sale or the offering for sale of said lands pursuant to said notice will hinder, delay and embarrass the plaintiff in the work of building and equipping the uncompleted portions of said railroad, will depress and perhaps render wholly unsalable the bonds of said company, upon the sale of which the plaintiff is largely dependent for means with which to prosecute the said work, said bonds being secured by mortgage upon said road and the said lands, and will greatly hazard, and at least partially defeat the purpose and object of the grant of lands so made by the Congress of the United States, as aforesaid, to aid in the construction of the said railroad.

And the plaintiff further says that the county auditor aforesaid intends to and will, unless restrained by this court, attempt
511 to further embarrass this plaintiff, and further cloud the title to this plaintiff's said lands by directing and instructing the said several assessors to again assess and return the said lands for taxation for the year 1868; and upon such assessment and return being made, will proceed to assess a tax upon the said lands, and each and every parcel thereof, for the year 1868, in like manner as the taxes for the year 1867 were assessed by him upon such lands as hereinabove alleged.

Wherefore the plaintiff prays that the said Frank M. Parcher,

County Treasurer, and the said Henry Kreis, County Auditor of said county, the defendants in this action, and their successors in office, may be perpetually and forever restrained and enjoined, the said treasurer from selling, and the said auditor from making or delivering any certificate of purchase or deed of any of the said lands of the plaintiff under or pursuant to said notice, or in any other manner, for or by reason of the taxes assessed thereon, as in this complaint stated, for the year 1867; and that both said defendants be so restrained and enjoined from attempting in any manner to collect, or enforce the collection of, the said taxes or any part thereof, and that the said auditor and his successors in office may be so restrained and enjoined from directing the assessors of said county, or any of them, to assess or return for taxation the said lands, or any part thereof, for the year 1868, and from assessing upon said lands or any part thereof any taxes for the year 1868, or any subse-
512 quent year, until such lands shall be sold and conveyed by the plaintiff; also that the taxes so assessed upon said lands for the year 1867 be adjudged and declared illegal and void, and that the said county auditor or his successors in office be directed by this court to cancel such taxes upon the books of his office, or in some other manner to indicate upon the said books the judgment of this court in the premises.

Also, that a preliminary injunction may be issued out of this court restraining the said defendants and each of them from proceeding to sell the said lands or any part thereof, pursuant to said notice or otherwise, for the taxes so assessed thereon for the year 1867, and from seeking or attempting in any other manner to collect *or* enforce the collection of such taxes, or any part thereof, and restraining said county auditor from assessing any further or other tax upon the said lands, or directing their assessment or return for such taxation—unless in case of a sale and conveyance thereof by said plaintiff—during the pendency of this action, or until the further order of the court.

And for such other or further relief as to the court shall seem meet or proper in the premises.

H. R. BIGELOW,
Att'y for Plaintiff, St. Paul, Minn.

(Duly verified.)

513 (Here follows a list of the lands referred to, which is identical with the lands described in the judgment herein.)

Complaint endorsed and filed May 15th, 1868.

STATE OF MINNESOTA,
Wright County:

District Court, 4th Judicial District.

THE FIRST DIVISION OF THE SAINT PAUL AND PACIFIC RAILROAD COMPANY
vs.
FRANK M. PARCHER, County Treasurer, and HENRY KREIS, County Auditor of Wright County.

Demurrer.

The defendants demur to the plaintiff's complaint upon the following grounds:

1st. That the plaintiff has no legal capacity to sue, for that said plaintiff sues as a body corporate, whereas in fact in appears from the face of the complaint that the plaintiff is not a body corporate, and that the plaintiff is neither natural nor an artificial person.

2nd. There is a defect of parties plaintiff, for that it appears upon the face of the complaint that one E. B. Litchfield and sundry other persons unnamed are the real parties in interest in this action, and should be named as plaintiffs therein.

514 3d. The complaint does not state facts sufficient to constitute a cause of action.

Dated May 28th, 1868.

GORDON & COLLINS,
Attorneys for Defendants, St. Cloud, Minn.

Demurrer filed June 2nd, 1868. A. F. Bark, Clerk.
Demurrer endorsed and filed June 2nd, 1868.

STATE OF MINNESOTA,
County of Wright:

District Court, 4th Judicial District.

THE FIRST DIVISION OF THE SAINT PAUL AND PACIFIC RAILROAD COMPANY
against
FRANK M. PARCHER, County Treasurer, and HENRY KREIS, County Auditor of the County of Wright.

AT CHAMBERS, MINNEAPOLIS.
May ——, *A. D.* 1868.

On reading and inspecting the complaint in this action, duly verified, and on motion of Mr. Bigelow, of counsel for the plaintiff, it is ordered that the defendants herein do appear before me at the court house, in Minneapolis, Hennepin Co., on the 23rd day of May, A. D. 1868, at 2 o'clock P. M., then and there to show
515 cause, if any there be, why a temporary injunction should not be granted in said action as prayed for in said complaint.

Further ordered that a copy of said complaint and of this order be served upon each of said defendants on or before the 16th day of May, A. D. 1868.

C. E. VANDERBURGH, *Judge.*

(Duly verified.)

By consent of parties the hearing upon the within order is postponed to the first day of the next general term of the District Court of Wright County, at the opening of the court on that day.

C. E. VANDERBURGH, *Judge.*

Order to show cause. Endorsed and filed June 2nd, 1868.

STATE OF MINNESOTA,
County of Wright:

District Court, 4th Judicial District.

FIRST DIVISION ST. P. & P. R. R. Co.
vs.
PARCHER and KREIS.

This cause came on to be heard on the first day of this term, upon the order to show cause why a temporary injunction should not be granted as prayed in the complaint, and the application for such injunction was argued by Mr. Bigelow, counsel for
516 the plaintiffs, and opposed by Mr. Gordon, of counsel for defendants, and now upon due deliberation it being suggested and shown in open court that the lands described in the schedule referred to in the said complaint, and thereto attached, have been offered for sale by the County Treasurer of said county, pursuant to the notice mentioned in said complaint, but that such lands remain unsold for want of bidders, it is ordered on motion of the said plaintiff's counsel that a temporary writ of injunction be and the same is hereby granted restraining and enjoining the defendants in this action, and each of them, and their successors in office, respectively, from permitting any person or persons to become the purchaser or purchasers of the said lands, or any part thereof, by paying into the treasury of the County of Wright the taxes levied thereon for the year 1867, with the penalty, costs and interest due thereon, or otherwise selling, or permitting the purchase of any part of such lands for such taxes, penalty, costs and interest, under or by virtue of the provisions of section 129, on page 184, of the General Statutes of this state, and restraining and enjoining the defendants Henry Kreis, county auditor, and his successors in office, from making or delivering any certificate of purchase, or deed of any of the said lands to any person or persons for or by reason of the said taxes, penalty, cost and interest, or upon or by reason of any sale of such lands for said taxes, penalty, cost and interest
517 during the pending of this section, or until the further order of this court.

Further ordered, that said injunction do issue upon the plaintiff's

filing as security therefor a bond or undertaking, duly approved by the Judge of this court, or a waiver of security, signed by the defendants' attorney.

Order Granting Temporary Injunction, Endorsed and Filed, Being a Copy of Court Minutes, as the Same Appear on Record in Book "A," Page 150 and 151:

The State of Minnesota to Frank M. Parcher, County Treasurer, and Henry Kreis, County Auditor, of the County of Wright, and their successors in office, respectively, and to their counsellors, soliciters, attorneys, agents and servants, Greeting:

Whereas, an action has been commenced in the District Court of the Fourth Judicial District, in and for the county of Wright, by the First Division of the Saint Paul and Pacific Railroad Company, plaintiff, against you the said Frank M. Parcher, County Treasurer, and Henry Kreis, County Auditor of said County of Wright, the complaint in which action was duly filed on the 15th day of May, A. D. 1868, and in which action the said court, upon the application of said plaintiff, after hearing you the said defendants, by counsel, in opposition, did, in and by an order duly made and entered on the third day of June, A. D. 1868,
518 order and direct that the temporary writ of injunction should issue restraining and enjoining you, and each and every of you, during the pendency of said action, or until the further order of said court, touching the matters set forth in the said complaint;

Now, therefore, you, the said Frank M. Parcher, County Treasurer, and Henry Kreis, County Auditor of said county, and your successors in office, respectively, your counsellors, solicitors, attorneys, agents and servants, are hereby strictly and firmly enjoined and commanded not to permit any person or persons to become the purchaser or purchasers of the lands described in the same complaint (which lands are situate in said county of Wright, and are particularly described in Schedule A, hereto annexed), or of any part thereof, by paying into the treasury of said county the taxes levied thereon for the year 1867, with the penalty, cost and interest due thereon, and not in any manner to sell, or permit the purchase of, any part of such lands for such taxes, penalty and cost and interest under or by virtue of the provisions of Section 129, on page 184, of the General Statutes; and not to make or deliver any certificate of purchase or deed of any of the said lands to any person or persons for or by reason of the said taxes, penalty, cost and interest, or upon or by reason of any sale of such lands for such taxes, penalty, cost and interest during the pendency of this action, or under the further order of said court.

This writ is hereby made returnable before the said court
519 on the first day of the next term thereof thereafter to be holden.

Witness the Honorable Charles E. Vanderburgh, Judge of said

District Court, at Buffalo, in the said County of Wright, this 11th day of June, A. D. one thousand eight hundred and sixty-eight.

A. F. BARKER,
Clerk District Court.

(Duly verified.)

(Here follows a list of the lands referred to, which is identical with the lands described in the judgment herein.)

THE FIRST DIVISION OF THE SAINT PAUL AND PACIFIC RAILROAD COMPANY
against
FRANK M. PARCHER, Co. Treasurer and HENRY KREIS, Co. Auditor of Wright County.

This cause coming on to be heard upon demurrer to the complaint was argued by Mr. Gordon, of counsel for the defendants, and by Mr. Bigelow, of counsel for the plaintiff.

And now, after due deliberation, it is ordered and adjudged that the said demurrer be and the same is overruled.

Further ordered, that the defendants have leave to answer the same complaint within twenty days after notice of this order.

520 STATE OF MINNESOTA,
Wright County:

District Court, 4th Judicial District.

THE FIRST DIVISION OF THE SAINT PAUL AND PACIFIC RAILROAD COMPANY
against
FRANK M. PARCHER, County Treasurer, and HENRY KREIS, County Auditor Wright County, Defendants.

Gentlemen, please take notice that the defendants appeal from the order of the above entitled court, made at the general term thereof, held in and for the county of Wright, on the 2nd day of June, 1868, overruling the defendant's demurrer to the plaintiff's complaint in the action to the Supreme Court of the State of Minnesota.

Dated June 3d, 1868.

GORDON & COLLINS,
Attorneys for Defendants, St. Cloud, Minnesota.

To H. R. Bigelow, Attorney for the Plaintiff, and to the Clerk of the District Court for Wright County, Minn.

Filed June 3, 1868.

A. F. BARKER, *Clerk.*

Copy of Court minutes.

521 UNITED STATES OF AMERICA,
Supreme Court, State of Minnesota, ss:

Mandate.

The State of Minnesota to the Hon. Judge and officers of the District Court of the 4th Judicial District, sitting within and for the County of Wright, Greeting:

Whereas, lately in your court, in an action therein pending, wherein The First Division of the St. Paul and Pacific Railroad Company was plaintiff, and Frank M. Parcher, County Treasurer, and Henry Kreis, County Auditor of Wright County, were defendants, a certain order was had therein overruling demurrer to the plaintiff's complaint, from which order said defendants appealed to this court.

And, whereas, the same was duly argued, heard and submitted at the general July term, 1869, of our Supreme Court, after mature deliberation thereupon had, our Supreme Court did adjudge, determine, decree and order, "That the order of the court below, herein appealed from, be and the same hereby is in all things affirmed, and that the respondent have judgment accordingly." A copy of the entry of judgment thereupon in this court is herewith transmitted, and made a part of this remittitur.

Now, therefore, this mandate is to you directed and certified to inform you of these proceedings had in our Supreme Court
522 in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness the Hon. C. G. Ripley, Chief Justice of the Supreme Court, and the seal thereof affixed at Saint Paul, this 12th day of February, A. D. 1870.

[SEAL.] SHERWOOD HOUGH,
Clerk of Supreme Court.

Mandate endorsed and filed Feb. 18th, 1870.

STATE OF MINNESOTA,
County of Wright:

District Court, 4th Judicial District.

THE FIRST DIVISION OF THE ST. PAUL AND PACIFIC RAILROAD COMPANY
against
FRANK M. PARCHER, County Treasurer, and HENRY KREIS, County Auditor of the County of Wright.

To Messrs. Gordon & Collins, defendants' attorneys:

GENTLEMEN: You will please take notice that the order
523 overruling the demurrer to the complaint in this action, and from which an appeal was taken to the Supreme Court of

this state, having been duly affirmed by said Supreme Court, a remittitur containing a certified copy of the judgment of said Supreme Court upon such appeal duly signed and sealed in accordance with the practice of the said Supreme Court, was duly transmitted to and filed with the clerk of this court on the eighteenth day of February, A. D. 1870. You will therefore please answer the complaint within twenty days from the service of this notice, or the plaintiff will apply for judgment in accordance with the statute and the rules and practice of this court in such case made and provided.

Yours, H. R. BIGELOW,
Plaintiff's Attorney.

Notice of Remitt-ur.
Endorsed and filed August 2nd, 1870.

524 *Affidavit of No Answer.*

Endorsed and Filed August 2nd, 1870.

STATE OF MINNESOTA,
County of Wright:

District Court, 4th Judicial District.

THE FIRST DIVISION OF THE SAINT PAUL AND PACIFIC RAILROAD COMPANY
against
FRANK M. PARCHER, County Treasurer, and HENRY KREIS, County Auditor of the County of Wright.

GENTLEMEN: You will please take notice that on the 23rd day of July, A. D. 1870, at 12 o'clock M. of that day, before the Honorable Charles E. Vanderburgh, Judge of this Court, at his chambers in the City of Minneapolis, in said district, an application will be made to this court in behalf of the plaintiff for judgment in this action as demanded in the complaint herein, and in accordance with the decision of said court herein made.

You will also please take notice of the order made by said Judge fixing the time and place for the hearing of said application, and hereon endorsed.

Yours, H. R. BIGELOW,
Plaintiff's Attorney.

525 To Messrs. Gordon & Collins, defendant's att'ys:

At chambers, July 14th, 1870, on application of plaintiff's attorney, I do hereby appoint the 23rd day of July, A. D. 1870, at 12 o'clock M., as the time, at my chambers in the city of Minneapolis, as the place for the hearing of the within mentioned application for judgment.

CHAS. E. VANDERBURGH, *Judge.*

Notice of application for judgment and order.
Endorsed and filed August 2nd, 1870.

STATE OF MINNESOTA,
County of Wright:

District Court, 4th Judicial District.

THE FIRST DIVISION OF THE SAINT PAUL AND PACIFIC RAILWAY COMPANY
against
FRANK M. PARCHER, County Treasurer, and HENRY KREIS, County Auditor of the County of Wright.

SPECIAL TERM, MINNEAPOLIS, *July 23rd*, A. D. 1870.

The complaint in this action, having been filed on the fifteenth day of May, A. D. 1868, and the defendant having in due time thereafter interposed a demurrer thereto, which demurrer, after argument by H. L. Gordon, Esq., of counsel for the defendants, in
526 support thereof, and H. R. Bigelow, of counsel for the plaintiff, in opposition, was by an order of this court, duly made on the third day of June, A. D. 1868, overruled, with leave, however, to the defendants to answer the said complaint within twenty days after notice of such order, if they should be so advised; and the defendants having appealed from said order to the Supreme Court of the state, upon which appeal such order was, after argument by counsel for the respective parties, and due deliberation thereon, in all things affirmed by said Supreme Court, and the cause having been after such affirmance duly remanded to this court by a remittitur from said Supreme Court duly filed herein on the eighteenth day of February, A. D. 1870.

Now, upon reading and filing notice of such remittitur, with proof of the due service thereof on the 25th day of February, A. D. 1870, upon Messrs. Gordon & Collins, the defendants' attorneys, with the affidavit of H. R. Bigelow, the plaintiff's attorney, that no answer to the said complaint has been received by him, and also a notice of *lis pendens*, with the certificate of the register of deeds of the said county of Wright endorsed thereon, showing that the same was duly recorded in his office on the twenty-first day of May, A. D. 1868, and proof of due notice to the defendants' attorneys of the application, and on motion of Mr. Bigelow, of counsel for the plaintiff, no one appearing for the defendants.

It is now ordered, adjudged and declared and decreed, that all the facts alleged in the complaint are true; that the defendant
527 Frank M. Parcher is, and for a long time past has been, the County Treasurer of the said County of Wright, and that the defendant Henry Kreis is, and for a long time past has been, the County Auditor of said county; that the plaintiff is a corporation duly created, organized and existing under the laws of this state, and is, and has been since some time prior to the year 1867, the owner in fee simple of all and singular the following described lands, situate and lying in the said County of Wright, viz.:

In Township 120, of Range 23.

The E. ½ of the N. E. ¼, and the N. W. ¼ of the S. W. ¼ of section 5.

In Township 121, of Range 23.

The W. ½ of the N. E. ¼, and the S. W. ¼ of the N. W. ¼, of section 19; the S. ½ of the S. E. ¼ of section 27; the N. W. ¼ of the N. W. ¼ of section 31, and E. ½ of the S. W. ¼, the W. ½ of the S. E. ¼, and the S. E. ¼ of the S. E. ¼ of section 33.

In Township 119, of Range 24.

The N. W. ¼ of section 7, and the N. ½ of the N. E. ¼ of section 19.

In Township 120, of Range 24.

The S. E. ¼ of section 3; the N. ½ of the N. W. ¼, and lots 3 and 4, of section 5; the N. ½ of the N. E. ¼ of section 9; the N. ½ of the N. W. ¼, and lots 1 and 4, of section 11; the S. W. ¼ of the S. E. ¼, the N. W. ¼ of the S. E. ¼, and the N. E. ¼
528 of the S. E. ¼ of section 15; the N. W. ¼ of section 21; lots 1 and 2 of section 23; the N. W. ¼ of the N. W. ¼, and lot 6, of section 27, lots 6 and 7, of section 29, and lots 1, 2 and 3, of section 33.

In Township 121, of Range 24.

The W. ½ of the S. W. ¼ of section 17; the N. W. ¼ of section 27; the S. W. ¼ of the N. E. ¼, and the S. E. ¼ of the S. W. ¼, of section 29, and the N. W. ¼ of section 33.

In Township 118, of Range 25.

The S. W. ¼ of section 1; the W. ½ of the N. W. ¼, and the E. ½ of the S. W. ¼ of section 3; lot 2 of section 7; the N. E. ¼ of the S. E. ¼ of section 9; the W. ½ of the S. E. ¼, and the N. ½ of the S. W. ¼ of section 11; the S. E. ¼ of the S. W. ¼ of section 19; the N. E. ¼ of section 25; the N. ½ of the S. E. ¼, the S. W. ¼ of the S. E. ¼, and the N. ½ of the S. W. ¼, of section 27; the N. ½ of the S. E. ¼ of section 29; the E. ½ of the N. E. ¼, the S. W. ¼ of the N. E. ¼, the N. W. ¼, and the E. ½ of the S. E. ¼ of section 31, and the S. W. ¼ of section 35.

In Township 119, of Range 25.

The N. ½ of the N. W. ¼, the S. E. ¼ of the N. W. ¼, the N. E. ¼ of the S. W. ¼, the S. ½ of the S. W. ¼, and lot 3, of section 1; the S. E. ¼ of the N. W. ¼, and S. E. ¼ of section 3; lots 6 and 7, and the W. ½ of the S. W. ¼, of section 5; the S. W. ¼ of section

11; the N. W. ¼, and S. W. ¼ of the S. E. ¼, of section 13;
529 the S. ½ of the S. W. ¼ of section 15; the E. ½ of the N. E. ¼, the E. ½ of the S. E. ¼, the E. ½ of the N. W. ¼, the N. W. ¼ of the N. W. ¼, and the N. W. ¼ of the S. W. ¼, of section 19; the S. W. ¼ of section 23; the S. W. ¼ of section 25; the N. ½ of the S. W. ¼ of section 29; the N. ½ of the S. E. ¼, of section 31; the N. W. ¼ of the N. E. ¼, the S. ½ of the N. E. ¼, and the N. W. ¼ of the S. E. ¼ of section 33, and the N. ½ of the S. E. ¼ of section 35.

In Township 120, of Range 25.

The W. ½ of the N. E. ¼, the W. ½ of the S. E. ¼, lot 2, and the S. W. ¼ of section 3; the S. E. ¼ of the N. W. ¼ the W. ½ of the S. E. ¼, and the S. W. ¼ of section 5;the W. ½ of the N. W. ¼, and the S. ½ of section 7; the N. E. ¼, the E. ½ of the N. W. ¼, the S. E. ¼, the E. ½ of the S. W. ¼, and lots 1 and 2, of section 9; the N. W. ¼, and the E. ½ of the S. W. ¼, of section 11; the W. ½ of section 15; the N. ½ of the N. E. ¼, the E. ½ of the N. W. ¼, the E. ½ of the S. W. ¼, and the S. W. ¼ of the S. W. ¼, of section 21; lots 3, 4, 5 and 6, and the E. ½ of the S. E. ¼ of section 23; the W. ½ of the N. W. ¼, the S. W. ¼ of the S. E. ¼, the E. ½ of the S. W. ¼, and lots 4, 5, 6 and 7, of section 25; the S. E. ¼ of the N. E. ¼, the W. ½ of the N. E. ¼, the N. W. ¼, the S. E. ¼, and the S. W. ¼ of section 27, and the S. ½ of the N. E. ¼, lot 1, the N. W. ¼, the S. E. ¼, and the S. W. ¼ of section 35.

530 In Township 121, of Range 25.

The S. W. ¼ of the N. W. ¼ of section 5; the N. W. ¼ of the N. E. ¼, the S. E. ¼ of the S. E. ¼, and lot 1, of section 7; the E. ½ of the N. W. ¼, and lots 8 and 9, of section 19; lot 1 of section 27, and the S. ½ of the N. E. ¼, the S. ½ of the N. W. ¼ and the S. E. ¼ of section 35.

In Township 122, of Range 25.

The S. W. ¼ of S. W. ¼ of section 31.

In Township 118, of Range 26.

The S. E. ¼ of the N. E. ¼, the E. ½ of the S. W. ¼, and the S. E. ¼ of section 1; the E. ½ of the S. E. ¼, of section 23; the S. W. ¼ of the N. E. ¼, the N. E. ¼ of the S. W. ¼, the N. W. ¼ of the S. E. ¼, and the S. E. ¼ of the S. E. ¼ of section 25, and the N. E. ¼ of the N. E. ¼ of section 35.

In Township 119, of Range 26.

The N. E. ¼, the N. E. ¼ of the N. W. ¼, the S. E. ¼ the S. E. ¼ of the S. W. ¼, and the W. ½ of the S. W. ¼, of section

23; the W. ½ of the N. E. ¼, the N. W. ¼ and the S. E. ¼, of section 25; and the N. E. ¼, the E. ½ of the N. W. ¼, the N. ½ of the S. E. ¼, and the W. ½ of the S. W. ¼, of section 35.

In Township 120, of Range 26.

The S. ½ of the S. E. ½, the S. W. ¼, and lots 1, 2, 3 and 4, of section 1; the S. ½ of section 3; the N. W. ¼, the S. W. ¼ of the S. W. ¼, and lots 1, 4 and 5, of section 5; the W. ½,
531 the N. ½ of the N. E. ¼, and lots 2, 3, 4 and 5, of section 7; the N. ½ and the S. W. ¼, of section 11; the N. ½ of the N. W. ¼, and the S. ½ of the S. E. ¼, of section 13; the N. E. ¼, the S. E. ¼ of the S. E. ¼, and lot 1, of section 15; the N. E. ¼, the E. ½ of the N. W. ¼, lot 2, and the S. W. ¼ of section 17; the N. E. ¼, the S. E. ¼, the E. ½ of the S. W. ¼, the N. W. ¼ of the S. W. ¼, and lot 1, of section 19; the N. W. ¼, and the E. ½ of the S. W. ¼, of section 21; the whole of sections 27 and 29; the N. E. ¼ of section 31; the N. W. ¼, the W. ½ of the N. E. ¼, and lots 1 and 2, of section 33, and lots 1 and 3 of section 35.

In Township 121, of Range 26.

The whole of sections 1 and 3; the N. ½, the E. ½ of the S. W. ¼, the S. W. ¼ of the S. W. ¼, and lot 2, of section 5; the N. E. ¼ and the S. W. ¼, of section 7; the N. E. ¼, the S. ½ of the N. W. ¼, and the S. ½ of section 9; the whole of section 11; the N. ½, the N. W. ¼ of the S. E. ¼, the N. E. ¼ of the S. W. ¼, and lot 4, of section 13; the W. ½ of the N. W. ¼ of section 15; the E. ½ of the N. E. ¼, the N. W. ¼ of the N. E. ¼, the S. W. ¼ of the S. E. ¼, and lots 1, 2 and 4, of section 17; the whole of section 19; the W. ½ and the S. ½ of the S. E. ¼, of section 21; the E. ½ of section 23; the N. ½ of the N. W. ¼, the N. W. ¼ of the S. W. ¼, the S. ½ of the S. W. ¼, the S. W. ¼ of the S. E. ¼, and lots 1 and 2 of section 25; the S. E. ¼ of the N. W. ¼, and the N. E. ¼ of the S. W. ¼ of section 27; the whole of section 29; the N. W. ¼, the W. ½ of the S. E. ¼, and the
532 S. E. ¼ of the S. E. ¼ of section 31; the N. ½ of the N. W. ¼, and the S. W. ¼ of the N. W. ¼ of section 33, and the E. ½ of section 35.

In Township 122, of Range 26.

Lots 2, 3 and 4, of section 15; the S. E. ¼ of the N. E. ¼ of section 17; the N. ½ of the N. W. ¼ of section 19; the N. E. ¼ of the N. W. ¼ and lots 4, 5 and 6, of section 21; the N. W. ¼, the N. W. ¼ of the S. W. ¼, and the S. E. ¼, of section 23; the S. W. ¼ of the N. E. ¼, the S. E. ¼, and the S. ½ of the S. W. ¼ of section 27; lot 6 of section 29; the whole of section 31; the S. ½ of the N. E. ¼, the N. ½ of the S. E. ¼, lots 1 and 2, the W. ½ of the S. W. ¼, and the S. E. ¼ of the S. W. ¼, of section 33, and the whole of section 35.

In Township 120, of Range 27.

The N. ½, the N. E. ¼ of the S. E. ¼, the S. ¼ of the S. E. ¼, and the S. W. ¼ of the S. W. ¼, of section 1; the N. E. ¼, the N. E. ¼ of the N. W. ¼, the S. ½, of the S. E. ¼, and lots 1, 2, 3 and 4, of section 3; the whole of sections 5 and 7; lot 1 of section 9; the whole of sections 11 and 13; the N. ½ of the N. E. ¼, the S. ½ of the N. W. ¼, the N. ½ of the S. E. ¼, and the S. W. ¼, of section 19, and the whole of sections 25 and 35.

In Township 121, of Range 27.

The N. ½, the N. ½ of the S. E. ¼, the N. W. ¼ of the S. W. ¼, and lots 2 and 3, of section 3; the W. ½ of the S. W. ¼, and lots 3, 4, 5 and 6, of section 5; lots 2 and 3 of section 7; the N. E. ¼ and the E. ½ of the S. E. ¼ of section 9; the whole of
533 sections 11 and 13; the N. E. ¼, the E. ½ of the N. W. ¼, the N. ½ of the S. E. ¼, and the S. W. ¼ of section 15; lots 1, 2 and 3, of section 17; lots 2, 3, 4 and 5, of section 19; the S. W. ¼ of the N. E. ¼, the S. E. ¼, the W. ½ of the S. W. ¼, and lots 1, 2 and 3, of section 21; and N. ½ and the S. W. ¼ of section 23; the S. ½ of section 25; the S. W. ¼ of the N. W. ¼, and lots 1, 2, 4 and 6, of section 27; the W. ½ of section 29; the N. ½, and the S. ½ of section 31, and the whole of sections 33 and 35.

In Township 122, of Range 27.

Lot 1 of section 13; the S. E. ¼ of the N. E. ¼ and the N. E. ¼ of the S. E. ¼ of section 21; the W. ½ of the N. E. ¼, the S. E. ¼ of the N. E. ¼, the N. E. ¼ of the S. W. ¼, the E. ½ of the S. E. ¼, and lot 2, of section 23; the S. ½ of the N. W. ¼, the S. E. ¼ of the S. E. ¼, the N. W. ¼ of the N. W. ¼, and the S. W. ¼ of section 25; the N. E. ¼ of the S. W. ¼, and the S. ½ of the S. W. ¼, of section 27; the N. W. ¼ and the W. ½ of the S. W. ¼, of section 33, and the N. E. ¼, and the S. ½ of section 35.

In Township 120, of Range 28.

The whole of sections 1, 3, 5, 7 and 9; the N. ½ of the N. E. ¼, the E. ½ of the N. W. ¼, and lots 1, 2 and 3, of section 11; the S. ½ of the N. E. ¼ of section 15; the whole of section 17; the N. E. ¼ of the N. E. ¼ of section 19; the N. ½, the N. ½ of the S. E. ¼, and the N. E. ¼ of the S. W. ¼ of section 21, and the N. E. ¼ of the N. E. ¼ of section 25.

534 In Township 121, of Range 28.

All that part of section 3 which is south of Crow river; the S. W. ¼ of the N. E. ¼, of section 9; all that part of section 11 which lies south of Crow river; the W. ½ of section 13; the N. ½, and

the S. W. ¼ of section 15; the whole of sections 23 and 25; the S. ½ of section 19; the N. ½ of the S. E. ¼, and the S. W. ¼ of section 21; the N. E. ¼ of the S. E. ¼, and lots 1, 2, 3, 4 and 5, of section 21; the N. E. ½ of the N. E. ¼, the S. ½ of the S. E. ¼, the N. W. ¼, and the S. W. ¼, of section 29, and the whole of sections 31, 33 and 35.

Explanatory Note.—In this schedule, the abbreviation N. is used for, and signifies, *North;* the abbreviation E. is used for, and signifies, *East;* the abbreviation S. is used for, and signifies, *South;* the abbreviation W. is used for, and signifies *West;* the abbreviation N. E. is used for, and signifies, *North East;* the abbreviation S. E. is used for, and signifies, *South East;* the abbreviation N. W. is used for, and signifies *North West*, and the abbreviation S. W. is used for, and signifies *South West;* and the descriptions are from, and with reference to, the United States Government surveys of the lands.

H. R. BIGELOW,
Plaintiff's Attorney, St. Paul, Minn.

That the defendant Henry Kreis, County Auditor, as aforesaid, in the year of our Lord 1867—the said lands having been
535 assessed and returned to him as such auditor by the assessors of the several townships and districts in said county—did assess upon the same lands of the plaintiff, and upon each and every parcel thereof, taxes for the said year 1867, in the same manner and to the same extent as he was authorized to do, and did so, upon lands subject to taxation in said county, and did enter the several parcels of the said lands of the plaintiff with the amount of taxes so assessed upon each parcel thereof upon the grand tax duplicate of said county for said year, and deliver such duplicate to the treasurer of said county, to-wit: the defendant Frank M. Parcher, for collection; and that afterwards and on the twenty-fifth day of April, A. D. 1868, the taxes so assessed upon the said lands of the plaintiff not having been paid, and the said county auditor defendant having entered and included the same in the list of delinquent taxes for said year 1867, he the said county auditor, defendant, did cause the last of delinquent lands in said county for said year 1867, including therein the said lands of the plaintiff, to be duly published in a newspaper printed and published in said county, with a notice thereto appended, and by him subscribed, that the whole of the several tracts of land in said list contained, or so much thereof as should be necessary to pay the taxes and penalty charged thereon would be sold at the court house in said county on the first Monday of June then next, by the County Treasurer of said county, unless such taxes and penalty should be paid before
536 that time, and that such sale would commence at ten o'clock A. M. of said last mentioned day, and continue from day to day until all the land contained in such list should be sold or offered for sale.

And it is further adjudged, declared and decreed that the said

lands of the plaintiff were not, nor was any part or parcel thereof, in the year 1867, subject to taxation by or under the laws of this state, and that all and singular the taxes so assessed thereon as aforesaid, as well as all subsequent proceedings had or taken for the collection or enforcement of such taxes, or for the sale of said lands for the same, were and are illegal and wholly and absolutely void to all intent and purposes whatsoever; and the said County Auditor and his successors in office are hereby strictly commanded and enjoined to cancel such taxes upon the books of his office by writing in said books, whereon the entry of such taxes or of any of them appears, as conspicuously as may be, the words "Cancelled by order of Court"; and that the said County Treasurer and County Auditor defendants, and their successors in office, are hereby perpetually and forever restrained and enjoined, the said treasurer from selling, and the said Auditor from making or delivering any certificate of purchase or deed of any of the said lands of the plaintiff, under or pursuant to said notice so published as aforesaid, or in any other manner for, or by reason of the taxes so aforesaid, assessed thereon, for the year 1867; and both of the said defendants and their
537 successors in office are hereby forever restrained and enjoined from attempting in any manner to collect or enforce the collection of the said taxes, or any part thereof.

And it is further adjudged, declared and decreed that the said lands of the plaintiff are not now, and that they have not been heretofore, subject to taxation under the laws of this state; but that they are now and have heretofore been, and until sold by the plaintiff will continue to be, wholly exempt from taxation under such laws; and the said defendants, and each of them, and their successors in office, are hereby commanded and enjoined to refrain, and absolutely desist from assessing or attempting to collect or enforce any taxes whatever on any part or parcel of the said lands of the plaintiff, for the year 1868, or for any subsequent year so long as such part or parcel of said lands shall remain the property of the plaintiff.

And it is further adjudged and decreed that the defendants do pay to the plaintiff the costs of this action by said plaintiff sustained, amounting to the sum of forty-one dollars and forty-five cents, and that the plaintiff have execution therefor.

By the Court,

C. E. VANDERBURGH, *Judge*.

Entered and signed August 2nd, 1870.

W. W. BRASIE, *Clerk*.
By H. KREIS, *Deputy*.

Defendants' final judgment.
Endorsed and filed August 2nd, 1870.
538 (Duly certified by the Clerk of said District Court of Wright County, Minnesota.)

277

DEFENDANT'S EXHIBIT 35.

STATE OF MINNESOTA:

Supreme Court.

THE FIRST DIVISION OF THE SAINT PAUL AND PACIFIC RAILROAD COMPANY

vs.

FRANK M. PARCHER, County Treasurer, and HENRY KREIS, County Auditor of the County of Wright.

The complaint, demurrer, order overruling the demurrer, notice of appeal to the Supreme Court and certificate of the clerk, are hereby omitted because they have already appeared herein as a part of Defendant's Exhibit 34.

Syllabus.

Under the five million loan amendment to the Constitution of this state, the mortgage required upon "the roads, lands and franchises" of the companies accepting the loan, was a mortgage upon all the roads, all the lands and all the franchises of such companies including the corporate franchise or right to be a corporation. The power to mortgage such corporate franchise was given to the Minnesota and Pacific Railroad Company, by the 21st Section of its Charter,
539 as well as by the amendment aforesaid. By virtue of a foreclosure (as alleged in the complaint in this case) of the mortgage or deed of trust executed by the Minnesota and Pacific Railroad Company, in accordance with said amendment to the Constitution and provisions of law, the State of Minnesota, as purchaser at the foreclosure sale, became owner of all the roads, lands and franchises of the Minnesota and Pacific Railroad Company.

It was competent for the state to take and hold the same without merger or extinguishment like a private person. If anything was wanting to make perfect the title of the state to all the roads, lands and franchises of the Minnesota and Pacific Railroad Company, it seems that such title would be made perfect by the forfeiture accruing under the act of March 8th, 1861, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad." Upon such foreclosure and forfeiture, the act of March 10th, 1862, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad and to amend and continue the act of incorporation relating thereto," operated to transfer to the persons named therein all the roads, lands and franchises of the Minnesota and Pacific Railroad Company. This act does not violate Section 2, of Article 10, of our State Constitution.

The St. Paul and Pacific Railroad Company, upon being organized under and in pursuance of said act of March 10th, 1862, became a corporation, and was vested with all the roads, lands and franchises

of the Minnesota and Pacific Railroad Company, including
540 the corporate franchise of the same. Under an arrangement made between the St. Paul and Pacific Railroad Company and the holders of special and preferred stock (the details of which arrangement are particularly set forth in the complaint and opinion), the act of March 4th, 1864 relating to the registry of railroad organizations, and the act of February 6th, 1866, entitled "An act to legalize and confirm the organization, acts and proceedings of the First Division of the St. Paul and Pacific Railroad Company, and in relation to the character and powers of said company," the First Division of the St. Paul and Pacific Railroad Company became a body corporate, and as such was authorized to sue and be sued, and was endowed with all the rights, benefits, privileges, property, franchises, powers and interests purporting to be granted and conferred under the arrangement before referred to, and said act of February 6th, 1866.

It was competent for the legislature of the territory of Minnesota to grant to the Minnesota and Pacific Railroad Company the right to hold the lands granted by the United States in aid of its lines of road, exempt from taxation, until the same were sold and conveyed by said company, and this grant was made by the 18th section of the charter of said company. The territory had power to bind the future state by such grant of exemption. This grant was not in contravention of the provision of Section 6, of our Organic Act, which reads as follows: "Nor shall the land or other property
541 of non-residents be taxed higher than the lands or other property of residents." The agreement of the Minnesota and Pacific Railroad Company to build the lines of railroad, and to fulfill the other duties imposed by the charter, and among them to pay taxes as therein prescribed, was a sufficient consideration to sustain such grant. This grant of exemption was not personal to the Minnesota & Pacific Railroad Company, but passed to the state, if not as a franchise, as a right appendant to the lands, and was held by the state without merger or extinguishment.

Upon the transfer by the state to the St. Paul and Pacific Railroad Company, this right passed with the lands, and other rights and franchises, to said company. Under the arrangement and legislation of February 6th, 1866, before referred to, this right passed to The First Division of the St. Paul & Pacific Railroad Company, so far as it related to the lands applicable to those portions of the road and branch acquired by said First Division. The transaction between The St. Paul and Pacific Railroad Company and the holders of its special and preferred stock, through which, and the act of Feb. 6th, 1866, The First Division of the St. Paul & Pacific Railroad Company became a corporation, and possessed of such lands, was not a sale and conveyance of the lands within the meaning of the 18th section of the charter of the Minnesota and Pacific Railroad Company, so as to subject the same to taxation.

542 Here follows the opinion of the Supreme Court in the above case as the same appears in the report in First Division of St. Paul and Pac. R. R. Co. *v.* Parcher, in vol. 14, Minnesota Reports, pp. 297ff (Gil. pp. 224).

DEFENDANT'S EXHIBIT 36.

STATE OF MINNESOTA,
County of Stevens:

District Court Twelfth District.

In the Matter of Proceedings to Enforce Payment of Taxes Remaining Delinquent on the First Monday of January, 1886, for the County of Stevens, State of Minnesota.

To the Supreme Court of the State of Minnesota:

The County of Stevens, plaintiff, against which the District Court above entitled, has decided the points raised by the defense and objections made by the St. Paul, Minneapolis & Manitoba Railway Co., respondents, to certain taxes levied and assessed against said tracts or parcels of land, and which are sought to be enforced and collected in these proceedings, having made application to said District Court for leave to present the said points to the Supreme Court and it appearing to said District Court that the said points and questions involved are of great public importance and likely to arise frequently, the said District Court hereby makes the following
543 statement for the information of said Supreme Court on the hearing of said points.

A list of taxes on real estate delinquent on the first Monday of January, 1886, for said County of Stevens, was duly filed in the office of the Clerk of said District Court, in which list, among other lands, the following tracts and parcels of land appear, with taxes levied against them for the following years: That is to say, Sec. 13, T. 123, R. 41 Lot 2, Sec. 11, in T. 126, R. 41; also the N. ½ of the S. E. ¼ of Sec. 11, in T. 126, R. 41; Lot 4 of Sec. 11, in T. 126, R. 41, all for the year 1884.

That the St. Paul, M. & M. Ry. Co. duly appeared in said proceedings and, among other things, filed its answer and objections as to all of said tracts and parcels of land, for all the taxes above specified and claimed against said land, and that said answer was as follows:

STATE OF MINNESOTA,
County of Stevens:

District Court, Twelfth Judicial District.

In the Matter of Proceedings to Enforce Payment of Taxes on Real Estate Remaining Delinquent on the First Monday in January, 1886, for the County of Stevens, State of Minnesota.

The St. Paul, Minneapolis & Manitoba Railway Company, which is a corporation for railway purposes duly organized under
544 Title 1, of Chapter 34, of the General Statutes, and the acts amendatory thereof, and especially an act entitled "An act

to amend Title 1, of Chapter 34, of the General Statutes, relating to corporations," being Chapter 30, of the General Laws of 1876, and which is, and at all times since June, 1879, has been, and now is, the owner and in possession of and engaged in operating all the lines of railroad hereinafter mentioned, for its answer and objection and defense to the taxes sought to be enforced against each and every of the parcels of land which, with the names of the owners thereof, are described and stated in the list of delinquent taxes filed and published in the above entitled proceedings, as follows:

Description.

Town of Moore, Township 123, Range 41.

Meed, A. A.—Sec. 12, 640 acres.

Town of Swan Lake, Township 126, Range 41.

Sahlmark, Kate—Lot 4, sec. 11, 14.30 acres.
Sahlmark, Kate—W. ½ S. E. ¼ sec. 11, 80 acres.
Sahlmark, Kate—Lot 2, sec. 11, 39.90 acres.

Village of Morris.

Caswell, H. M.—Lot 7, blk. 26.
Flynn, Samansha C.—Lot 8, blk. 26.

—alleges as follows:

That by purchase thereof at mortgage foreclosure sales in May and June, 1879, this respondent became, and still is, the owner in fee of all that part of the lines of railroad of the Minnesota & Pacific Railroad Company and the St. Paul & Pacific Railroad Com-
545 pany, and the First Division of the St. Paul & Pacific Railroad Company, extending from St. Anthony, in the County of Hennepin, to Breckenridge, in the County of Wilkin, in this state, and formerly known as the main line of said First Division of the St. Paul & Pacific Railroad Company, and of the lands granted by the United States to the state of Minnesota, by the acts of Congress, approved March 3, 1857, and March 3, 1865, hereinafter mentioned and by an act of Congress entitled "An act authorizing the St. Paul & Pacific Railroad Company to change its line in consideration of a relinquishment of lands," approved March 3, 1871, and by the said state granted to said companies, or either of them, to aid in the construction of said main line, and of all the property, rights, franchise, immunities, exemptions and privileges at any time possessed by said companies, or either of them, including the exemption from ordinary taxation hereinafter mentioned, pertaining to said line of railroad and said granted lands; which said purchase by this respondent, and its right and title to all said line of railroad, lands, property, rights, franchises, immunities, exemptions and privileges were fully confirmed to this respondent by an act of the legis-

lature of this state, approved March 7, 1881, entitled "An act confirming the organization and certain purchases of the St. Paul, Minneapolis and Manitoba Railway Company, and in relation to the charter, powers, franchises and property of said company."

546 That the said Minnesota & Pacific Railroad Company was created a corporation by an act of the Legislative Assembly of the Territory of Minnesota, approved May 22, 1857, entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said state,' and granting certain lands to railroad companies therein named," and by the said act the same company was empowered to construct the lines of railroad therein named, of which lines the said main line of the First Division of the St. Paul & Pacific Railroad Company has always been a portion. And by said act of May 22, 1857, there was granted to said Minnesota & Pacific Railroad Company all the interest of the Territory and State of Minnesota in the lands granted to said territory to aid in the construction of said lines by the act of Congress mentioned in the title of said act, and which act of congress was approved March 3, 1857.

"That in and by said act of May 22, 1857, it was provided (in the 18th section thereof) as follows in regard to said Minnesota & Pacific Railroad Company:

"The said company shall and will, on or before the first day of March in each year pay into the treasury of the territory or future state three per centum of the gross earnings of the said rail-

547 road for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever."

And in and by said section it was further provided as follows:

"And for securing to the territory or state the payment of the aforesaid per centum, it is hereby declared that the state shall have a lien upon the railroads of said company, and upon all other property, estate and effects of the said company, whether real, personal or mixed; and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company."

And in and by said section it was further provided as follows:

"And in consideration of such annual payments, the said company shall be forever exempt from all taxes and assessments whatever by the territory, or state which shall succeed the territory, or by any county, city, town, village or other municipal authority in the territory or state, upon all stock in the said Minnesota and Pacific Railway Company, whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal or mixed, held by said company; and said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company shall be exempt from all taxation till sold and conveyed by said company."

That thereafter all and singular the rights, privileges, franchises,

lands, property and interests of said Minnesota & Pacific Rail-
548 road Company became and were vested in the State of Min-
nesota, and were, by a public law of the state, entitled "An act to facilitate the construction of the Minnesota & Pacific Railroad, and to amend and continue the act of incorporation relating thereto," approved March 10, 1862 re-granted by said state to the said St. Paul & Pacific Railroad Company.

That thereafter, by an act of Congress, approved March 3, 1865, entitled "An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," an additional grant of lands was made by the United States to the State of Minnesota to aid in the construction of said lines of railroad of the St. Paul & Pacific Railroad Company; and by a public act of the legislature of this state, entitled "An act to aid and facilitate the completion of the St. Paul & Pacific Railroad and branches," approved March 2, 1865, the said additional lands so granted to the state and all lands that should thereafter be granted by Congress to the State of Minnesota, for the purpose of aiding in the construction of the lines or any portion of the lines of railroad of the St. Paul & Pacific Railroad Company, and all the present and future interest of the state in said lands, were granted to said company.

That in the year 1864, by proceedings duly had pursuant to the provisions of a public law of this state, entitled "An act to amend the charter of the St. Paul & Pacific Railroad Company," approved February 6, 1864, the said First Division of the St. Paul &
549 Pacific Railroad Company was duly organized as a corporation, and became the owner of said main line and of all the lands so granted to aid in the construction thereof, and of all the property, rights, franchises, immunities and exemptions of said Minnesota & Pacific Railroad Company and said St. Paul & Pacific Railroad Company, in any way relating to said line or said granted lands. Which said organization of said First Division of the St. Paul & Pacific Railroad Company, and its title to said lines of railroad, lands, franchises, immunities and exemptions were duly confirmed in said company by a public law of this state, approved February 6, 1866, entitled "An act to legalize and confirm the organization, acts and proceedings of the First Division of the St. Paul & Pacific Railroad Company, and in relation to the character and powers of said company."

That by a public law of this state, approved March 4, 1865, entitled "An act in relation to the taxation of lands granted to the St. Paul & Pacific Railroad Company," it is enacted as follows:

"SEC. 1. That whenever any lands heretofore or hereafter granted to the St. Paul & Pacific Railroad Company, to aid in the construction of its road or branches, shall be contracted to be sold, conveyed or leased by said company, the same shall be placed upon the tax list by the proper officers for taxation as other real estate for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made; but in enforcing the col-
550 lection of the taxes thereon the title or interest of the said company or of any trustees or mortgagee thereof, shall be in

no wise impaired or affected thereby, but the improvement thereon and all the interest of the purchaser or lessee therein may and shall, in case of default of the payment of taxes upon such land, be sold to satisfy the same, and it shall be the duty of the proper officers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes; and that the provisions of the several acts in relation to the taxation of the lands of said company, so far as the mode of taxing such lands conflicts with the provisions of this act, shall be and they are hereby repealed.

"SEC. 2. That upon the filing by said company, in the office of the Secretary of State, of a notification of its acceptance of this act, the same shall thereupon become obligatory upon the state as well as upon said company; provided, that said notice of acceptance shall be given within sixty days.

"SEC. 3. This act shall take effect and be in force from and after its passage."

That the St. Paul & Pacific Railroad Company did duly accept the said act of March 4, 1865, and did file a notification of said acceptance in the office of the Secretary of State of this state, on the 16th day of March, 1865; and the First Division of the St. Paul & Pacific Railroad Company did duly accept said act, and did file a notification of such acceptance in the office of the Secretary
551 of State of this state, on the 29th day of April, 1865. And thereupon the said law became, and has ever since been, obligatory upon the state and upon the said companies, and upon each of them, and upon this respondent as the successor to the property, rights and franchises of said companies as hereinbefore set forth. And that said law and the contract therein expressed has never been altered, repealed or rescinded.

That the said companies and this respondent have at all times fully complied with all the provisions of law in respect to returns of gross earnings and payment of a tax of three per centum thereon in lieu of all other taxes, and in respect to reports of lands sold, or contracted to be sold, and forfeited contracts.

That the said parcels of land as to which this answer is interposed are, and each of them is, a part of the lands so as aforesaid granted by Congress and by this state to aid in the construction of said main line, and ever since the year 1879 have all been, and now are, owned in fee by this respondent by virtue of the public laws of this state and the proceedings thereunder hereinabove mentioned, and deeds of conveyance thereof by the Governor of this state pursuant to said laws, and after full performance of all the conditions of said grants; and no part of the same has ever been leased, sold or conveyed, nor except as hereinafter stated, has any part of the same been contracted to be leased, sold or conveyed.

That heretofore the said parcels of land were by this re-
552 spondent contracted to be sold to divers persons, the name of the person to whom each of said parcels was so contracted to be sold, and the date of such contract being as follows:

TOWN OF MOORE.

Subdivision.	Section.	Township.	Range.	Date of contract.	Person to whom contracted.
All	13	123	41	May 16, 1881.	A. A. Mead.

TOWN OF LAKE SWAN.

Subdivision of section.	Section.	Township.	Range.	Date of contract.	Person to whom contracted.
Lot 4	11	126	41	Feb. 15, 1884.	Kate Sahlmark.
W. ½ S. E. ¼ and Lot 2	11	126	41	Nov. 15, 1883.	Kate Sahlmark.

VILLAGE OF MORRIS.

Subdivision of section.	Section.	Township.	Range.	Date of contract.	Person to whom contracted.
Lot 7, Block 26	..	...	..	March 17, 1883.	H. M. Caswell.
Lot 8, Block 26	..	...	..	June 28, 1883.	S. C. Flynn.

553 That the payments required by said contracts to be made and the conditions therein required to be performed by the persons with whom such contracts were made as aforesaid, have not been performed in the case of any such contracts, nor has any person, by reason of such contracts, or any of them, become entitled to the fee of any of said parcels, or any part of said parcels, or entitled to a conveyance from this respondent of any of said parcels of land, or of any part of any of said parcels; but, on the contrary, each and every of said parcels has always continued, as aforesaid, to be and now is owned in fee by this respondent.

That by reason of the matters herein set forth, no judgment should be entered in this proceeding against any title or estate or interest of this respondent in any of said parcels of land, and that in any judgment that may be entered against said parcels of land, or any of them, in this proceeding, it should be expressly provided that neither such judgment, nor any sale that may be made thereunder, shall in any wise impair or affect the title or interest of this respondent, or of any trustee or mortgagee thereof in such parcel of land.

R. B. GALUSHA AND
YOUNG & LIGHTNER,
Attorneys for St. Paul, Minneapolis & Manitoba Railway Company, Respondent, St. Paul, Minn.

S. L. CAMPBELL,
Of Counsel.

(Duly acknowledged.)

554 District Court, County of Stevens.

In the Matter of the Proceedings to Enforce the Payment of the Taxes on Real Estate Remaining Delinquent on the First Monday of January, 1886, for the County of Stevens, State of Minnesota.

The St. Paul, Minneapolis & Manitoba Railway Company, Respondent.

Stipulation.

It is hereby stipulated by and between the parties hereto, that the facts set forth in the respondent's answers and objections to the taxes involved herein, are true; and that the hereto attached copy of contract, is a true and correct copy of the form and contents of the contracts referred to in said answers and objections; and that the annexed exhibit marked "B" is a correct copy of the acceptance of the acts of the Legislature of March, 1865, referred to in said answer; and that this matter may be, and hereby is submitted to said Court for decision and determination on said answer and this stipulation.

C. L. BROWN,
County Attorney, Stevens Co.
S. L. CAMPBELL,
Of Counsel, St. P. M. & M. R'y. Co.

555 Exhibit "A."

(Copy.)

Land Department of the St. Paul, Minneapolis & Manitoba Railway Company.

This agreement, made this 15th day of February, in the year 1884, between the St. Paul, Minneapolis & Manitoba Railway Co., of the first part, and Kate Sahlmark of Stevens County, State of Minnesota, of the second part, Witnesseth, that in consideration of the stipulations herein contained and payments to be made, as is hereafter specified, the first party hereby agrees to sell unto the second party, the Lot numbered four of Section No. 11, in Township No. 126 N. of Range No. 41, W. of the 5th Principal Meridian, containing, according to the United States survey, fourteen and thirty-one hundredths acres, be the same more or less, for the sum of one hundred twenty-eight dollars and seventy cents, on which the second party hath paid the sum of twenty dollars, being twelve dollars and eighty-seven cents on account of the principal, and seven dollars and thirteen cents, ten months' interests in advance, at seven per cent. per annum, upon the unpaid balance. And the said second party, in consideration of the premises, hereby agrees to pay

to the said first party, at the Land Department of the St. Paul, Minneapolis & Manitoba Railway Company, at St. Paul, Minnesota, the following sums of principal and interest at the several times named below:

556	When due.	Prin.	Int.	Evidence of payment.
First	payment, December 15th, 1884..	.....	$8.10	Rec'd Dec. 31, '84, $8.10.
Second	" December 15th, 1885..	$12.87	7.20	
Third	" December 15th, 1886..	12.87	6.30	
Fourth	" December 15th, 1887..	12.87	5.40	
Fifth	" December 15th, 1888..	25.74	3.60	
Sixth	" December 15th, 1889..	25.74	1.80	
Seventh	" December 15th, 1890..	25.74		

557 And it being mutually understood, that the above premises are sold to said second party for improvement and cultivation, the said second party hereby further agrees and obligates himself, his heirs and assigns, that all improvements placed upon said premises shall remain thereon, and shall not be removed or destroyed, until final payment for said land. And further, that he will punctually pay said sums of money, above specified, as each of the same becomes due; and that he will regularly and seasonably pay all such taxes and assessments as may be lawfully imposed upon said premises, or said improvements.

The party of the second part hereby agrees to cut no wood or timber from said land, except a sufficient quantity for fuel and fencing to be used on said land.

In case the said second party, his legal representatives or his assigns, shall pay the several sums of money aforesaid, punctually, and at the several times above limited, and shall strictly and literally perform all and singular his agreements and stipulations aforesaid, after their true tenor and intent, then the first party will make unto the said second party, his heirs or assigns (upon request at the Land Office of the first part at St. Paul, and the surrender of this contract), a deed conveying said premises in fee simple, reserving, however, a strip of land one hundred and fifty feet wide, to be used by the first party for a right of way or other railroad purposes, where the line of the St. Paul, Minneapolis and Manitoba Railway, or
558 any of its branches, is or shall be laid over the premises.

But in case the second party shall fail to make the payments aforesaid, or any of them, punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally, without any failure or default, the times of payment being of the essence of this contract, then the party of the first part shall have the right to declare this contract null and void, and all rights and interests hereby created or then existing in favor of the said second party, or derived under this contract, shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in said first party (without any declaration or forfeiture or act of re-entry, or without any other act by said first party to be performed, and without any right of said second party of reclamation

or compensation for monies paid or improvements made), as absolutely, fully and perfectly, as if this contract had never been made. If, however the said first party shall elect not to declare this contract null and void in case the second party shall fail to make the payments, or any of them, as above stipulated, the second party agrees to pay interest, at the rate of ten per cent. per annum, annually, on all payments of both principal and interest from the date of their maturity.

And it is further stipulated, that no assignment of the premises shall be valid unless the same shall be endorsed hereon, or
559 permanently attached hereto, and countersigned by the Commissioner of the Land Department, for which purpose this contract must be sent to this department, by mail or otherwise, and that no agreements or conditions or relations between the second party and his assignee, or another person acquiring title or interest from or through him, shall preclude the first party from the right to convey the premises to said second party or his assigns, on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due to the first party.

In witness of which, The St. Paul, Minneapolis and Manitoba Railway Company hath caused these presents in duplicate to be signed by the Commission- of the Land Department, and to be countersigned by either the President or one of the Vice Presidents of the Company, and the second party hath hereunto set his name on the day and year first above written.

(Signed) JAMES B. POWER,
Commissioner.

(Signed) KATE SAHLMARK, *Purchaser.*

Countersigned,

—— ——,
2nd Vice President.

Witness,

—— ——.

560 "EXHIBIT B."

At a special meeting of the Board of Directors of the St. Paul & Pacific Railroad Company, held pursuant to the call of the President at the office of the company in St. Paul, on the 14th day of March, 1865, there were present the following directors: Hon. R. R. Nelson, Vice President; H. S. Wells, Dwight Woodbury and S. E. Thompson. On motion of Mr. Nelson it was resolved by the Board of Directors of the St. Paul & Pacific Railroad Company that the act of the Legislature of the State of Minnesota entitled "An act to aid and facilitate the completion of the St. Paul & Pacific Railroad and its branches," approved March 2, 1865, and the act of the Legislature of the State of Minnesota, entitled "An act in relation to the taxation of land, granted to the St. Paul & Pacific Railroad Company," approved March 4, 1865, and the terms and provisions of the same,

and each of them, and they are, hereby accepted and adopted by the executive officers of the company, and they are hereby directed to file in the office of the Secretary of State, a copy of the foregoing resolutions as a notification of the satisfaction of the acceptance by this company of said acts.

R. R. NELSON,
Acting President.
HENRY ACKER, *Secretary.*

561 STATE OF MINNESOTA,
County of Stevens:

District Court, Twelfth Judicial District.

In the Matter of the Proceedings to Enforce the Payment of the Taxes on Real Estate Remaining Delinquent on the First Monday in January, 1886, for the County of Stevens, State of Minnesota.

The St. Paul, Minneapolis & Manitoba Railway Company having duly filed its answer in this proceeding, and the said answer having duly come on for trial at the general term of this court, and the county attorney of said Stevens County, appearing for said county, having admitted in open court at said trial that all the averments of fact in said answer are true as therein stated, and the matter having thereupon been submitted to the Court for determination:

I find as facts that all the allegations of fact in said answer contained are true.

As a conclusion of law I find that the said St. Paul, Minneapolis & Manitoba Railway Company is entitled to the relief prayed in said answer.

It is therefore ordered that judgment be entered discharging the estate, title and interest of said St. Paul, Minneapolis & Manitoba Railway Company, and of any trustee or mortgagee thereof, in or to each of the parcels of land in said answer described from the taxes set down against the same respectively in the delinquent list filed in this proceeding and from all penalties.

And it is further ordered that except as to said estate, title
562 and interest of said company, and of any trustee or mortgagee thereof, judgment be entered against each of said parcels of land for the amount of the taxes and penalties set opposite the same respectively, in said delinquent list; but that said judgment shall expressly provide that neither such judgment nor any sale that may be made thereunder shall in any wise impair or affect the title or interest of said St. Paul, Minneapolis & Manitoba Railway Company, or of any trustee or mortgagee thereof, in or to any of said parcels of land.

Dated July 21, A. D. 1886.

JOHN H. BROWN,
Judge of District Court.

Witness my hand this 23rd day of August, 1886.

JOHN H. BROWN,
District Judge.

Attest:
SAMUEL LARSON, *Clerk.*

563 STATE OF MINNESOTA:

Supreme Court.

COUNTY OF STEVENS
vs.
ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

Syllabus.

First Division, etc. R. Co. *v* Parcher, 14 Minn. 224 (297), and other cases, followed, holding that the exemption from ordinary taxation, originally created in favor of the Minnesota & Pacific Railroad Company, passed, with the lands to which it was appendant, to the St. Paul & Pacific Railroad Company, and to the First Division of the St. Paul & Pacific Railroad Company.

That right of exemption being a contract between the state and the corporation, the act of March 2, 1865 (Sp. Laws, c. 6), modifying that exemption, was ineffectual until accepted by the corporation. It not appearing that this was accepted until after the act of March 4, 1865 (Sp. Laws, c. 9), the latter act (protecting as against tax proceedings the title remaining in the corporation after the lands had been contracted to be sold) is to be deemed a tender by the state of a new contract, which upon acceptance became effectual.

It being established by the admissions of the parties that
564 this respondent succeeded to the ownership of certain lands formerly granted to and held by the Minnesota & Pacific Railroad Company and its successors, and to the exemption from ordinary taxation formerly enjoyed by those corporations, and pertaining to such lands, held, that the title remaining in the respondent after it had contracted to sell such lands (the purchase price being still unpaid, and the conditions of the purchase being still unperformed) is protected, in accordance with the terms of the act of March 4, 1865, from sale for taxes.

Held, following former decisions, that the provisions of law relating to such exemption (originally created prior to the adoption of the constitution) are not unconstitutional.

The act of March 4, 1865, was not repealed by the general tax law of 1878.

(Here follows the opinion of the Supreme Court in the above case as the same appears in the report of said case in Vol. 36, Minn. Reports, pp. 467 ff.)

(Duly certified by the Clerk of the Supreme Court of Minnesota.)

565 DEFENDANT'S EXHIBIT 37.

STATE OF MINNESOTA:

Supreme Court, April Term, 1898.

STATE OF MINNESOTA,
County of Traverse:

District Court, Sixteenth Judicial District.

COUNTY OF TRAVERSE
vs.
SAINT PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

In the Matter of the Proceedings to Enforce Payment of the Taxes on Real Estate Remaining Delinquent on the First Monday in January, 1896, for the County of Traverse and State of Minnesota.

To the Supreme Court of the State of Minnesota:

A list of taxes on real property for the year 1894, remaining delinquent on the first Monday in January, 1896, for said county of Traverse, upon real property, described in said list, including all the real property described in the schedules attached to the amended answer of said Saint Paul, Minneapolis and Manitoba Railway Company hereinafter set forth, having been duly filed by the county auditor of said county, in the office of the clerk of this court,
566 and that said list together with a notice, as provided by law, having been duly published as required by law; the said Saint Paul, Minneapolis and Manitoba Railway Company prior to the 20th day of March, A. D. 1896, duly filed in the office of the clerk of said court in and for said county of Traverse, its answer objecting to the taxes assessed against the several pieces and parcels of land described in the several schedules attached to said answer, which said answer was subsequently with leave of said court duly amended; which answer when so amended was and is in words and figures following, to-wit:

(Title.)

Amended Answer.

The St. Paul, Minneapolis & Manitoba Railway Company, which is a corporation for railway purposes duly organized under the laws of the state of Minnesota, and especially an act entitled "*An* act to amend Title 1 of Chapter 34 of the General Statutes relating to corporations," being Chapter 30 of the General Laws of 1876, and which is, and at all times since June, 1879, has been, and now is, the owner of all the lines of railroad hereinafter mentioned, for its amended

answer and objection and defence to the taxes sought to be enforced against each and every of the parcels of land hereinafter described, alleges as follows:

That, by purchase thereof at mortgage foreclosure sales, in the months of May and June, A. D. 1879, the respondent became
567 and remains, the owner in fee, of those lines of railroad, situated in this state, formerly owned by the Minnesota and Pacific Railroad Company, the Saint Paul and Pacific Railroad Company, and the First Division of the Saint Paul and Pacific Railroad Company, commonly known, one, as the "Main line" extending from Saint Paul to Breckenridge, another as the "Branch line," extending from St. Anthony (now the eastern division of the city of Minneapolis) to Watab, and another, as the "Saint Vincent Extension," extending from East Saint Cloud to Saint Vincent; and of the lands granted by the United States to the former territory and present state of Minnesota by the acts of congress approved March 3, 1857, and March 3, 1865, hereinafter mentioned, and by an act of congress entitled "An act authorizing the St. Paul & Pacific Railroad Company to change its line, in consideration of a relinquishment of lands," approved March 3, 1871, and by the said state granted to said companies, or either of them, to aid in the construction of said lines of railway, and each of them and of all the property, rights, franchises, immunities, exceptions and privileges at any time possessed by said companies, or either of them, including the exemption from ordinary taxation hereinafter mentioned, pertaining to said line of railroad and said granted lands; which said purchase by this respondent, and its right and title to all said line of railroad, lands, property, rights, franchises, immunities, exemptions and privileges were fully confirmed to this respondent by an
568 act of the legislature of this state, approved March 7th, 1881, entitled "An act confirming the organization and certain purchases of the St. Paul, Minneapolis and Manitoba Railway Company, and in relation to the charter, powers, franchises and property of said company."

That the said Minnesota & Pacific Railroad Company was created a corporation by an act of the legislative assembly of the territory of Minnesota, approved May 22, 1857, entitled "An act to execute the trust created by an act of congress entitled 'An act making a grant of land to the territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the state of Alabama to aid in the construction of a certain railroad in said state and granting certain lands to railroad companies named therein," and by the same act the said company was empowered to construct certain lines of railroad therein named, including the main and branch lines aforesaid. And by said act of May 22, 1857, there was granted to said Minnesota & Pacific Railroad Company all the interest of the territory and state of Minnesota in the lands granted to said territory to aid in the construction of said lines, by the said act of congress approved March 3, 1857.

That in and by said act of May 22, 1857, it was provided (in the

18th section thereof) as follows in regard to said Minnesota & Pacific Railroad Company:

"The said company shall and will, on or before the first day of March in each year, pay into the treasury of the territory
569 or future state three per centum of the gross earnings of said railroad for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever."

And in and by said section it was further provided as follows:

"And for securing to the Territory or state the payment of the aforesaid per centum, it is hereby declared that the state shall have a lien upon the railroads of the said company, and upon all other property, estate and effects of the said company, whether real, personal or mixed; and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company."

And in and by said section is was further provided as follows:

"And in consideration of such annual payments, the said company shall be forever exempt from all taxes and assessments whatever by the territory or state which shall succeed the territory, or by any county, city, town, village or other municipal authority in the territory or state, upon all stock in the said Minnesota and Pacific Railroad Company, whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal or mixed, held by said company; and said land granted by said act of congress hereby authorized to be conveyed to said Minnesota and Pacific Railroad Company shall be exempt from all taxation till sold and conveyed by said company."

570 That thereafter all and singular the rights, privileges, franchises, lands, property and interests of said Minnesota and Pacific Railroad Company, became and were vested in the state of Minnesota, and were, by a public law of the state, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act of incorporation relating thereto," approved March 10, 1862, re-granted by said state to the said St. Paul and Pacific Railroad Company.

That thereafter, by an act of congress approved March 3, 1865, entitled "An act extending the time for the completion of certain land grants railroads in the states of Minnesota and Iowa, and for other purposes," an additional grant of lands was made by the United States to the state of Minnesota to aid in the construction of said lines of railroad of the St. Paul & Pacific Railroad Company; and by a public act of the legislature of this state, entitled "An act to aid and facilitate the completion of the St. Paul & Pacific Railroad and branches," approved March 2, 1865, the said additional lands so granted to the state, and all lands that should thereafter be granted by congress to the state of Minnesota, for the purpose of aiding in the construction of the lines or any portion of the lines of railroad of the St. Paul & Pacific Railroad Company, and all the present and future interest of the state in said lands, were granted to said company.

That in the year 1864, by proceedings duly had pursuant to the

provisions of a public law of this state, entitled "An act to
571 amend the charter of the St. Paul & Pacific Railroad Company," approved February 6, 1864, the said First Division of the St. Paul & Pacific Railroad Company was duly organized as a corporation, and became the owner of said main and branch lines of railroad and of all lands so granted to aid in the construction thereof, and of all the property, rights, franchises, immunities and exemptions of the Minnesota and Pacific Railroad Company, and said St. Paul & Pacific Railroad Company, in any way relating to said lines or said granted lands. Which said organization of said First Division of the St. Paul & Pacific Railroad Company, and its title to said lines of railroad, lands, franchises, immunities and exemptions were duly confirmed in said company by a public law of this state, approved February 6, 1866, entitled "An act to legalize and confirm the organization, acts and proceedings of the First Division of the Saint Paul and Pacific Railroad Company, and in relation to the charter and powers of said company."

That by a public law of this state, approved March 4, 1865, entitled "An act in relation to the taxation of lands granted to the Saint Paul and Pacific Railroad Company," it is enacted as follows:

SEC. 1. That whenever any lands heretofore or hereafter granted to the St. Paul and Pacific Railroad Company, to aid in the construction of its road or branches, shall be contracted to be sold, conveyed or leased by said company, the same shall be placed
572 upon the tax list by the proper officers for taxation as other real estate for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made; but in enforcing the collection of the taxes thereon the title or interest of the said company, or of any trustee or mortgagee thereof, shall be in no wise impaired or affected thereby, but the improvement thereon and all the interest of the purchaser or lessee therein may and shall, in case of the default of the payment of taxes upon such land, be sold to satisfy the same, and it shall be the duty of the proper officers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes; and that the provisions of the several acts in relation to the taxation of the lands of said company, so far as the mode of taxing such lands conflict with the provisions of this act, shall be and they are hereby repealed.

"SEC. 2. That upon the filing by said company, in the office of the secretary of state of a notification of its acceptance of this act, the same shall thereupon become obligatory upon the state as well as upon said company: Provided, that said notice of acceptance shall be given within sixty days."

"SEC. 3. This act shall take effect and be in force from and after its passage."

That the St. Paul and Pacific Railroad Company did duly accept the said act of March 4, 1865, and did file a notification of said acceptance in the office of the secretary of state of this state on
573 the 16th day of March, 1865, and the First Division of the St. Paul and Pacific Railroad Company did duly accept said act, and did file a notification of such acceptance in the office of the

secretary of state of this state, on the 29th day of April, 1865. And thereupon the said law became, and has ever since been, obligatory upon the state and upon said companies, and upon each of them, and upon this respondent as the successor to the property, rights and franchises of said companies as hereinbefore set forth. And that said law and the contract therein expressed has never been altered, repealed or rescinded.

That by another public law of this state, approved March 3, 1865, entitled "An act to aid and facilitate the completion of the Saint Paul and Pacific Railroad and Branches," it was provided:

"SEC. 2. Any and all additional *grants* of land made prior to the passage of this act, or which may hereafter be made by the congress of the United States, to the state of Minnesota, for the purpose of aiding in the construction of the lines of railroad or any portion of them authorized to be constructed by the Saint Paul and Pacific Railroad Company, shall inure to the benefit of said company, and said lands and the present and future interest of the state in or to them, are hereby granted and assigned unto the said company upon the same terms and conditions as the lands heretofore granted for the same purpose, together with the conditions contained in said act of congress donating the same. And in the title of all
574 lands heretofore or hereafter granted by the congress of the United States to the state of Minnesota for the purposes aforesaid, shall vest in said company at the time, and upon the terms prescribed by said act or acts of congress making the grant, and it shall be the duty of the governor, on behalf of the state, to convey to said company the lands so granted according to the terms and provisions contained in the act or acts aforesaid."

That by said act of congress approved March 3, 1871, it was enacted as follows:

"An act authorizing the Saint Paul and Pacific Railroad Company to change its line in consideration of a relinquishment of lands.

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled: that the Saint Paul and Pacific Railroad Company may so alter its branch lines that, instead of constructing a road from Crow Wing to St. Vincent, and from St. Cloud to the waters of Lake Superior, it may locate and construct, in lieu thereof, a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing laws: provided, however, that this change shall in no manner enlarge said grant, and that this act shall only
575 take effect upon condition of being in accord with the legislation of said state of Minnesota, and upon the further condition that proper releases shall be made to the United States by said company, of all lands along said abandoned lines from Crow Wing to St. Vincent, and from St. Cloud to Lake Superior, and that upon

the execution of said releases, such lands so released shall be considered as immediately restored to market without further legislation.

Approved March 3, 1871."

The said act was in accordance with the legislature of the state of Minnesota, and was duly accepted by the St. Paul & Pacific Railroad Company, which duly performed all conditions contained in said act relating to the vesting of the title to the lands there described in the said company.

The said main, branch and St. Vincent extension lines of railroad, have all been long since constructed, completed, and put into operation, and continuously operated, under and in pursuance of the said several acts of congress and legislature, by the respondent and its said predecessor.

That the said companies and this respondent have at all times fully complied with all the provisions of law in respect to returns of gross earnings and payment of a tax of three per centum thereon in lieu of all other taxes, and in respect to reports of lands sold, or contracted to be sold, and forfeited contracts, and have duly paid and satisfied all said taxes, from time to time, as the same have accrued and become payable.

That the said parcels of land, which are described in
576 schedules "B" and "C" hereto annexed and made a part of this answer, are, and each of them is, a part of the lands so as aforesaid granted by congress and by this state to aid in the construction of said lines or of one of the same, and ever since the year 1879 have all been, and now are, owned in fee by this respondent by virtue of the public laws of this state, and the proceedings thereunder hereinbefore mentioned, and deeds of conveyance thereof by the governor of this state, pursuant to said laws, and after full performance of all the conditions of said grants; and no part of the same has ever been leased, sold or conveyed, by said railway company.

That heretofore divers of said contracts became and were forfeited by failure of the persons with whom the same were made to make the payments therein required, and thereupon this respondent, by virtue of the power retained by it in said contracts, did cancel and annul the same, and did thereupon at once become reinvested with all the interest, estate and title it had in the land embraced in said contracts prior to the making of such contracts, as fully as if the same had never been made; which land is described in schedule "B" hereto annexed and made a part of this answer.

That heretofore certain of said parcels of land, which are described in schedule "C," hereto annexed and made a part of this answer, were by this respondent, or its predecessors, contracted to be sold to divers persons but that the payments required by said con-
577 tract to be made and the conditions therein required to be performed by the persons with whom such contracts were made as aforesaid, have not been performed in the case of any of such contracts, nor has any person, by reason of such contracts, or any of them, become entitled to the fee of any of said parcels, or any part of any of said parcels, or entitled to a conveyance from the

respondent of any of said parcels of land, or of any part of any of said parcels; but, on the contrary, each and every of said parcels has always continued, as aforesaid, to be, and now is, owned in fee by this respondent.

That by reason of the matters herein set forth, judgment should be entered in this proceeding discharging the lands described in said schedule "B" and each and every parcel thereof, from all taxes set down against the same, respectively, in the delinquent list filed in this proceeding and from all penalties.

That no judgment should be entered in this proceeding against any title, estate or interest of this respondent in any of said parcels of land, described in said schedule "C" and that in any judgment that may be entered against any parcel of land embraced in said schedule "C" it should be expressly provided that neither such judgment or any sale that may be made thereunder shall in any wise impair or affect the title or interest of this respondent, or
578 of any trustee or mortgagee thereof, in such parcel of land.

R. A. WILKINSON AND
JNO. L. SNAPP,
Attorneys for St. Paul Minneapolis and Manitoba Railway Company, Respondent, St. Paul, Minn.

(Duly acknowledged.)

TRAVERSE COUNTY.

SCHEDULE "B."

Description.	Section.	Township.	Range.
Clifton.			
N. ½	33	127	45

TRAVERSE COUNTY.

SCHEDULE "C."

Township of Leonardsville.	Town 125, Range 45.
Description.	Section.
S. E. ¼	1
Township of Clifton.	Town. 127, Range 45.
Description.	Section.
N. E. ¼	23
N. W. ¼	23
S. E. ¼	23
S. W. ¼	23
Township of Lake Valley.	Town 127, Range 46.
Description.	Section.
N. W. ¼	15
Town 129, Range 47.	Town 129, Range 47.
	Section.
S. E. ¼	3

579 The above list of lands, marked "Schedule C," includes all the lands on which the taxes for the year 1894 still remain unpaid or uncanceled. The taxes on the remaining lands described in schedule "C," attached to the amended answer on file and of record in these proceedings, have, prior to the filing of the judgment in these proceedings, either been paid by the purchasers thereof or canceled by order of the State Auditor, upon the cancellation of the contracts held by the purchasers.

The Hon. C. L. Brown, Judge of said court, having expressed his unwillingness to try or determine the issue raised by said answer of said St. Paul, Minneapolis and Manitoba Railway Company in said proceedings, by reason of the fact that same time prior thereto he acted as attorney for one of the parties, in a similar proceeding against the same respondent, and thereupon the said above entitled proceedings and the issues raised therein by said answer were, by stipulation of the parties and the order of said court, duly referred to the Honorable Gorham Powers, Judge of the District Court of the 12th Judicial District, in said state, to hear, try and determine the same.

Said proceedings and issues raised by said answer as amended, came duly on for trial by stipulation of the parties, before said Judge and Referee Powers, on the 27th day of July, A. D. 1896, at ten o'clock A. M., at the village of Granite Falls, in the County of Yellow Medicine, in said state, and the following proceedings were
580 then had:

The following facts were stipulated and agreed upon by both parties as facts in said proceedings, and were admitted in evidence as such, viz.:

(Title.)

Stipulation of Facts.

It is hereby stipulated and agreed by and between the County of Traverse aforesaid, and the St. Paul, Minneapolis and Manitoba Railway Company, by their respective attorneys, and said parties hereby admit that the following statement of facts, whether alleged in the answer of said railway company or not, shall be taken and deemed to be the truth, and the facts at the trial of the issues raised by the answer of said railway company for all the purposes of said proceedings, viz.:

That said St. Paul, Minneapolis and Manitoba Railway Company, respondent herein, is a corporation for railway purposes, duly organized under the laws of the State of Minnesota, as in said answer stated.

That by purchase thereof at mortgage foreclosure sales, in the months of May and June, 1879, the respondent became the owner in fee of these lines of railroad, situated in this state, formerly owned by the Minnesota and Pacific Railroad Company, the St. Paul & Pacific Railroad Company, and the First Division of the St. Paul

and Pacific Railroad Company, commonly known, one as the "Main Line," extending from St. Paul to Breckenridge, another as the "Branch Line," extending from Saint Anthony (now the
581 Eastern Division of the City of Minneapolis) to Watab, and another as the "Saint Vincent Extension," extending from East Saint Cloud to Saint Vincent; and of the lands granted by the United States to the former Territory and present State of Minnesota, by the acts of Congress approved March 3, 1857, and March 3, 1865, hereinafter mentioned, and by an act of Congress entitled "An act authorizing the St. Paul & Pacific Railroad Company to change its line; in consideration of a relinquishment of lands," approved March 3, 1871, and by the said state granted to said companies, or either of them, to aid in the construction of said lines of railway, and each of them, and of all the property and franchises at any time possessed by said companies, or either of them, pertaining to said line, of railroad; the certificates of sale and conveyances of the same having been duly filed in the office of the Secretary of State of the State of Minnesota in said year 1879.

That the said Minnesota and Pacific Railroad Company was created a corporation by an Act of the Legislative Assembly of the Territory of Minnesota, approved May 22, 1857, entitled "An act to execute the trust created by an Act of Congress entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said state,' and granting certain lands to railroad companies therein
582 named," and by the same act the said company was empowered to construct certain lines of railroad therein named, including the main and branch lines aforesaid. And by said act of May 22, 1857, there was granted to said Minnesota and Pacific Railroad Company all interest of the Territory and State of Minnesota in the lands granted to said territory to aid in the construction of said lines by the said Act of Congress, approved March 3, 1857.

That in and by said Act of May 22, 1857, it was provided (in the eighteenth section thereof) as follows in regard to said Minnesota and Pacific Railroad Company:

"That said company shall and will, on or before the first day of March in each year, pay into the treasury of the territory or future state three per centum of the gross earnings of said railroad for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever." And in and by said section it was further provided as follows:

"And for securing to the territory or state the payment of the aforesaid per centum, it is hereby declared that the state shall have a lien upon the railroads of the said company, and upon all other property, estate and effects of the said company, whether real, personal or mixed; and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company." And in and by said section it was further provided as follows:

"And in consideration of such annual payments, the said
583 company shall be forever exempt from all taxes and assessments whatever by the territory, or state which shall succeed the territory, or by any county, city, town, village or other municipal authority in the territory or state upon all stock in the Minnesota and Pacific Railroad Company, whether belonging to said company or individuals, and upon all its franchises or estates, real, personal or mixed, held by said company; and said land granted by said act of Congress hereby authorized to be conveyed to said Minnesota and Pacific Railroad Company shall be exempt from all taxation till sold and conveyed by said company."

That thereafter all and singular the rights, privileges, immunities, franchises, lands and property of said Minnesota and Pacific Railroad Company became and were vested in the State of Minnesota, without merger or ex-inguishment, and were, by a public law of the state, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act of incorporation relating thereto," approved March 10, 1862, regranted by said state to the said St. Paul and Pacific Railroad Company.

That thereafter by an act of Congress, approved March 3, 1865, entitled "An act extending the time for the completion of certain land grant railroads in the States of Minnesota and Iowa, and for other purposes," an additional grant of land was made by the United States to the State of Minnesota to aid in the construction of said lines of railroad of the St. Paul and Pacific Railroad Com-
584 pany; and by a public act of the Legislature of this state, entitled "An act to aid and facilitate the completion of the St. Paul and Pacific Railroad and branches," approved March 2, 1865, the said additional lands so granted to the state, and all lands that should thereafter be granted by Congress to the State of Minnesota for the purpose of aiding in the construction of the lines or any portion of the lines of railroad of the St. Paul and Pacific Railroad Company, and all the present and future interest of the state in said lands were granted to said company.

That in the year 1864, by proceedings duly had pursuant to the provisions of a public law of this state entitled "An act to amend the charter of the St. Paul and Pacific Railroad Company," approved February 6, 1864, the said First Division of the St. Paul and Pacific Railroad Company was duly organized as a corporation, and became the owner of said main and branch lines of railroad, and of all lands so granted to aid in the construction thereof, and of all the property, rights, franchises, immunities and exemptions of the Minnesota and Pacific Railroad Company, and said St. Paul and Pacific Railroad Company, in any way relating to said lines or said granted lands. Which said organization of said First Division of the St. Paul and Pacific Railroad Company and its title to said lines of railroad, lands, franchises, immunities and exemptions were duly confirmed in said company by a public law of this state, approved Feb-

ruary 6, 1866, entitled "An act to legalize and confirm the
585 organization, acts and proceedings of the First Division of the Saint Paul and Pacific Railroad Company, and in relation to the character and power of said company."

That by a public law of this state, approved March 4, 1865, entitled "An act in relation to the taxation of the lands granted to the Saint Paul and Pacific Railroad Company, it is enacted as follows:

SEC. 1. That whenever any lands heretofore or hereafter granted to the St. Paul and Pacific Railroad Company, to aid in the construction of its road and branches, shall be contracted to be sold, conveyed or leased by said company the same shall be placed on the tax list by the proper officers for taxation as other real estate for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made; but in enforcing the taxes thereon the title or interest of the said company, or of any trustee or mortgagee thereof, shall be in no wise impaired or affected thereby, but the improvements thereon, and the interests of the purchaser or lessee therein may and shall, in case of default of the payment of taxes on said land, be sold to satisfy the same, and it shall be the duty of the proper officers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes; and that the provisions of the several acts in relation to the taxation of the said lands of said company, so far as the mode of taxing such lands conflicts with the provisions of this act, shall be and they are hereby repealed.

586 SEC. 2. That upon the filing by said company, in the office of the Secretary of State, of a notification of its acceptance of this act the same shall thereupon become obligatory upon the state as well as upon said company; provided, that said note of acceptance shall be given within sixty days.

SEC. 3. This act shall take effect and be in force from and after its passage.

That the St. Paul and Pacific Railroad Company did duly accept the said act of March 4, 1865, and did file a notification of said acceptance in the office of the Secretary of State of this state on the 16th day of March, 1865; and the First Division of the St. Paul and Pacific Railroad Company did duly accept said act and did file a notification of said acceptance in the office of the Secretary of State of this state on the 29th day of April, 1865. And that said law has never been altered, repealed or rescinded.

That by another public law of this state, approved March 2, 1865, entitled "An act to aid and facilitate the completion of the St. Paul and Pacific Railroad and branches," it is provided:

"SEC. 2. Any and all additional grants of land made prior to the passage of this act, or which may hereafter be made by the Congress of the United States, to the State of Minnesota, for the purpose of aiding in the construction of the lines of railroad or any portion of them authorized to be constructed by the Saint Paul and Pacific Railroad Company, shall inure to the benefit of said company, and said lands and the present and future interest
587 of the state in them or to them which the state may have, are hereby granted and assigned unto the said company,

upon the same terms and conditions as the lands heretofore granted for the same purpose, together with the conditions contained in said act of Congress donating the same.

And the title of all lands heretofore and hereafter granted by the Congress of the United States to the State of Minnesota for the purposes aforesaid, shall vest in said company at the time, and upon the terms prescribed by said act or acts of Congress making the grant, and it shall be the duty of the Governor on behalf of the state to convey to said company the lands so granted, according to the terms and provisions contained in the act or acts aforesaid."

That the St. Paul and Pacific Railroad Company did duly accept the said act of March 2, 1865, and did file a notification of said acceptance in the office of the Secretary of State of this state on the 16th day of March, 1865.

That by said act of Congress, approved March 3, 1871, it was enacted as follows:

"An act authorizing the St. Paul and Pacific Railroad Company to change its line in consideration of a relinquishment of lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Saint Paul and Pacific Railroad Company may so alter its branch lines so that, instead of constructing a road from Crow Wing to St. Vincent, and from St. Cloud to the waters of Lake Superior, it may locate
588 and construct in lieu thereof a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands, to be taken in the same manner along said altered lines as is provided for the present lines by existing laws; provided, however, that this change shall in no manner enlarge said grant, and that this act shall only take effect upon condition of being in accord with the legislation of the State of Minnesota, and upon the further condition that proper releases shall be made to the United States by said company of all lands along said abandoned lines from Crow Wing to St. Vincent, and from St. Cloud to Lake Superior, and that upon the execution of said release such lands so released shall be considered as immediately restored to market without further legislation. Approved March 3, 1871."

The said act was in accordance with the legislation of the State of Minnesota, and was duly accepted by the St. Paul and Pacific Railroad Company, which duly performed all conditions contained in said act relating to the vesting of the title to the lands therein described in the said company.

The said main, branch and St. Vincent extension lines of railroad have all been long since constructed, completed and put into operation, and continuously operated, under and in pursuance of

the said several acts of Congress and Legislature by the
589 respondent and its predecessors until the year 1890, and since 1890 by the Great Northern Railway Company under and by virtue of the instrument or lease hereinafter mentioned.

That on the first day of February, A. D. 1890, a contract or instrument in writing was duly entered into and executed by and between this respondent, the St. Paul, Minneapolis and Manitoba Railway Company, as party of the first part, and the Great Northern Railway Company, as party of the second part, a copy of which contract or instrument in writing is hereto attached, marked Exhibit A, numbered from pages 1 to 62, both inclusive, and made a part hereof, and that said copy is to be used as evidence for all purposes of this proceeding to the same extent as the original.

That the Great Northern Railway Company, one of the parties to said contract or instrument, then was, ever since has been and is a corporation, organized and existing under the laws of the State of Minnesota, for railroad purposes, and ever since has been and is subject to the laws of said state.

That said Great Northern Railway Company, under and pursuant to said contract or instrument in writing, on the 1st day of February, A. D. 1890, took possession of all the railroads and railroad property of said respondent, and of all the lines of railway, branch lines, property and appurtenances, mentioned in said contract or instrument, and commenced to operate the same, and has ever since had the same in its possession and operated, and still does
operate, the same under and pursuant to the terms of said
590 contract or instrument in writing, and has complied with all the terms and conditions thereof, and the same is still in full force and effect.

That all the railways of this respondent hereinbefore mentioned and described are included in said contract, and have been and are in possession of and operated by said Great Northern Railway Company, by virtue of said contract as hereinbefore stated; and since the year 1890 said respondent, the St. Paul, Minneapolis and Manitoba Railway Company, has not and does not now operate any railroad or railroads in the State of Minnesota, except those operated by the Great Northern Railway Company under said contract as hereinbefore stated; that the Great Northern Railway Company, since the execution of said contract hereto attached, has paid every year, including the year of 1894, to the State of Minnesota three per centum of the gross earnings of all said lines of railway operated by it under said contract with respondent, and no other taxes whatever have been paid either by said respondent or by said Great Northern Railway Company on any of the railroads, property or franchises hereinbefore mentioned.

That the said parcels of land which are described in Schedules "B" and "C," annexed to respondent's answer, are and each of them is a part of the lands so as aforesaid granted by Congress and by this state to aid in the construction of said main line of railway from St. Anthony to Breckenridge, and were included in the mortgages

herein referred to, and ever since the year 1879 have all been
591 and are owned in fee by said respondent by virtue of deeds of conveyance executed by the Governor to its predecessors pursuant to said acts of Congress, and after full performance of the conditions of said grants, and by virtue of the purchase thereof by said respondent at mortgage foreclosure sale, as aforesaid, except as such ownership may be affected, or unless the said ownership was divested from respondent by the contract or written instrument hereto attached.

That heretofore certain of said parcels of land which are described in Schedule "C," attached to said answer, were by said respondent, or its predecessors, contracted to be sold to divers persons, but that the payments required by said contracts to be made, and the conditions therein required to be performed by the persons with whom such contracts were made as aforesaid, have not been performed in the case of any of such contracts, nor has any person by reason of such contracts, or any of them, become entitled to the fee of any of said parcels, or entitled to a conveyance from said respondent of any of said parcels of land, or of any part of any of said parcels, but each and every of said parcels has always continued as aforesaid to be and is owned in fee by said respondent, unless such ownership was affected or divested by said contract or instrument hereto attached.

It is further stipulated and agreed, and said plaintiff further admits, for the purposes hereinbefore stated, that the mortgages hereinbefore referred to, under and by virtue of the foreclosure of
592 which said respondent acquired title to the railroads, property and franchises of the Minnesota and Pacific Railroad Company, the St. Paul and Pacific Railroad Comp-ny, and the First Division of the St. Paul and Pacific Railroad Company, as stated and admitted on the first page of the stipulation, conveyed and mortgaged all the railroads, property and franchises of said companies, or either of them, including the franchises to be corporations and all of the said granted lands; and said mortgages purported to convey and mortgage all the rights, franchises, immunities and exemptions at any time possessed by said companies, or either of them; that said mortgages were in all things duly and regularly foreclosed, and the foreclosure proceedings therein, including the sheriff's certificates of sale and deeds, all decrees made and judgments entered therein, purported to convey and did convey to said respondent all the railroads, property and all of said granted lands, and all rights, franchises, privileges, immunities and exemptions at any time possessed by said companies, or either of them, if such rights, privileges, immunities and exemptions could be legally mortgaged, assigned or conveyed by said companies, or either of them, or acquired by purchase at such mortgage foreclosure sale or otherwise; but said plaintiff claims that the right, privilege or immunity of exemption from taxation was and is a personal right, not assignable, and could not be transferred, assigned or conveyed by mortgage and the foreclosure thereof, and therefore plaintiff does
593 not admit as a matter of law, that said mortgages or the foreclosure sale made thereunder carried with it or vested in said

respondent any right or immunity of exemption from taxation which may have been granted to or enjoyed by said St. Paul and Pacific Railroad Company, or said First Division of the St. Paul and Pacific Railroad Company; and the question as to whether respondent did or did not acquire such rights, immunities and exemptions is submitted to the court for its decision.

It is further stipulated and agreed that this stipulation, and the facts hereby admitted, shall not preclude either party from offering proof respecting any other allegations of respondent's answer, or of any other facts that may be material and not hereby admitted, and not inconsistent with any of the facts hereby admitted, and that either party may offer evidence to prove any other material facts not hereby admitted, and not inconsistent with the facts herein admitted to be true.

Dated July 30, 1897.

F. J. STEIDL,
Attorney for Traverse County.
R. A. WILKINSON AND
JNO. L. SNAPP,
Attorneys for St. Paul, Minneapolis and Manitoba Railway Company.

594 Said Saint Paul, Minneapolis and Manitoba Railway Company then offered in evidence the following acts of the Territorial and State Legislature of Minnesota, to each of which offers and acts said County of Traverse objected, separately, on the ground that each of said offers, and each of said acts so offered, was incompetent, immaterial and irrelevant.

Said trial judge overruled each of said objections and admitted in evidence each of said acts so offered. To each of which rulings said County of Traverse then and there duly excepted, viz:

1. Chapter 1, Special Laws, extra session of 1857, entitled: "An act to execute the trust created by an Act of Congress entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama in aid of the construction of a certain railroad in said state,' and granting certain land to railroads therein named." Approved May 22nd, 1857.

2. Chapter 20, of the Special Laws of 1862, entitled: "An act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act of incorporation relating thereto." Approved March 10th, 1863.

3. Chapter 3, of the Special Laws of 1864, entitled: "An act to amend the charter of the St. Paul & Pacific Railroad Company." Approved February 6th, 1864.

4. Chapter 6, of the Special Laws of 1865, entitled: "An
595 act to aid and facilitate the completion of the Saint Paul and Pacific Railroad and Branches." Approved March 2nd, 1865.

5. Chapter 9, of the Special Laws of 1865, entitled: "An act in

relation to the taxation of lands granted to the Saint Paul and Pacific Railroad Company." Approved March 4th, 1865.

6. Chapter 1, of the Special Laws of 1866, entitled: "An act to legalize and confirm the organization, acts and proceedings of the First Division of the Saint Paul and Pacific Railroad Company, and in relation to the charter and powers of said company." Approved February 6th, 1866.

7. Chapter 412, of the Special Laws of 1881, entitled: "An act confirming the organization and certain purchases of the Saint Paul, Minneapolis and Manitoba Railroad Company, and in relation to the charter, powers franchises and property of said company." Approved March 7th, 1881.

Both parties then rested.

It was then in open court agreed by both parties that no judgment should be directed to be entered, or be entered herein, against any of the lands described in any of the schedules attached to said amended answer, upon which the taxes may have been paid, since the commencement of this proceeding and up to the time of the making of the decision, and the entry of judgment herein, as the same may appear by the official record in the County Auditor's office in and for said Traverse County; and that all lands upon
596 which the taxes included in said delinquent list and said schedules attached to said amended answer have been paid as aforesaid, as the same appears by said County Auditor's record should be omitted from the decision and judgment to be entered herein.

It was then agreed by the respective parties and ordered by said trial court that said proceeding should be submitted to said trial judge by Messrs. R. A. Wilkinson and Jno. L. Snapp, the attorneys for said Saint Paul, Minneapolis and Manitoba Railway Company, and F. J. Steidl, the attorney for said County of Traverse, upon written briefs.

After hearing and duly considering the proofs and allegations herein, and the arguments of the respective parties hereto, said trial court, on the 4th day of October, A. D. 1897, duly made its findings and decisions herein, which was filed on the 16th day of October, 1897, and which is in words and figures as follows, to-wit:

(Title.)

The Saint Paul, Minneapolis and Manitoba Railway Company, having duly filed its answer in the above entitled proceedings, and the issues made by said answer having duly come on for trial before this court on the 27th day of July, A. D. 1897, F. J. Steidl appearing for plaintiff, and M. D. Grover and R. A. Wilkinson appearing for the defendant. Upon reading the stipulation of facts herein, and after hearing the evidence and arguments of counsel, I make and file the following findings of fact and conclusions of law:

597 *Findings of Fact.*

1st. That the allegations set forth in the answer of the Saint Paul, Minneapolis and Manitoba Railway Company interposed in these proceedings are true, and that said company owns and holds the lands described in said answer exempt from taxation until sold and conveyed, except as provided in Chapter 9, of the Special Laws of the Legislature of Minnesota of 1865.

2nd. That the land described in schedule "B," in said answer, to-wit: The N. ½ of section 33, Twp. 127, Rge. 45, is still owned in fee simple by said railway company, and no part thereof has been sold, conveyed or leased, or contracted to be sold, conveyed or leased by said company.

3rd. That the following lands described in Schedule "C," of the answer herein, are still owned in fee simple by the Saint Paul, Minneapolis and Manitoba Railway Company; that said lands have been contracted to be sold to divers persons by said railway company, but said contracts have not been perfected by any of the persons holding the same, and no person is entitled to conveyance from said railway company for any part of said lands, which lands are described in Schedule "C" as follows:

598

Leonardsville:	Sec.	Twp.	Rge.
S. E. ¼	1	125	44
Clifton:			
N. E. ¼	23	127	45
N. W. ¼	23	127	45
S. E. ¼	23	127	45
S. W. ¼	23	127	45
Lake Valley:			
N. W. ¼	15	127	46
Town 129, Range 47:			
S. E. ¼	3	129	47

4th. That as to the remaining lands described in said Schedule "C," the taxes have either been paid thereon by the purchasers from the railway company, or have been cancelled upon the cancellation of the contracts held by the purchasers from said railway company.

Conclusions of Law.

That the Saint Paul, Minneapolis and Manitoba Railway Company is entitled to the relief prayed for in the answer herein. It is therefore ordered:

1. That judgment be entered discharging the land set forth in Schedule "B" in said answer, as described in the second finding of

fact herein, from all taxes set down against the same, respectively, in the delinquent list filed in these proceedings, and from all costs and penalties.

2nd. That judgment be entered discharging the estate, right, title, and interest of said Saint Paul, Minneapolis and Mani-
599 toba Railway Company, and of any trustee or mortgagee thereof, in or to each of those parcels of land set forth in Schedule "C" of said answer, and described in the third finding of fact herein, from the taxes set down against the same, respectively, in the delinquent list filed in these proceedings and from all penalties.

3rd. That except as to said estate, title and interest of said railway company, and of any trustee or mortgagee thereof, judgment be entered against each of the said parcels of land described in said Schedule "C" and the third finding of fact herein, for the amount of the taxes and penalties set opposite the same, respectively, in said delinquent list; but said judgment shall expressly provide that neither such judgment, or any sale thereunder, shall in any wise impair or affect the estate, title or interest of said Saint Paul, Minneapolis and Manitoba Railway Company, or of any trustee or mortgagee thereof in or to any of said parcels of land.

Dated Oct. 4th, A. D. 1897.

GORHAM POWERS,
District Judge.

That pursuant to said findings and decision tax judgment was entered in and by said court in said proceedings on the tenth day of November, A. D. 1897, which judgment is in words and figures as follows, to-wit:

600 *Tax Judgment.*

(Title.)

A list of taxes on real property delinquent on the first Monday in January, 1896, for said County of Traverse, having been duly filed in the office of the clerk of this court, and the notice and list required by law having been duly published as required by law, and an answer having been duly filed in the office of the clerk of this court, prior to the 20th day of March, 1896, by the St. Paul, Minneapolis & Manitoba Railway Company, objecting to the taxes assessed against the several pieces and parcels of land hereinafter described in Schedules marked "B" and "C," respectively, being made a lien upon the estate, right, title, interest, claim or lien of the said St. Paul, Minneapolis & Manitoba Railway Company in or to said parcels of land, or any part thereof, or upon the estate, right, title, interest, claim or lien therein of any mortgagee or trustee of said railway company, and alleging in said answer that the land herein described in Schedule "B" was, prior to the date of said answer under contract of sale, but that said contract became and was forfeited by reason of the failure of the person with whom the same

was made to make the payments therein required, and thereupon the said contract was cancelled and annulled by said railway company by virtue of the power retained by it in said contract, and said railway company thereupon became reinvested with all the
601 interest, estate and title it had in the said land prior to the making of such contract, as fully as if the same had never been made; that the lands described in Schedule "C" have been contracted to be sold by said railway company to divers and sundry persons, but that the purchase price of said lands has in no instance been fully paid by said purchasers, and none of them are entitled to a conveyance in fee of said lands under their said contracts, and the title in fee to said lands still remains in said railway company, and that said lands (as well as the lands described in Schedule "B" before mentioned) are a part of the lands granted to said railway company to aid in the construction of its lines of railway, and are not subject to taxation, except in the manner in said answer set forth, and a stipulation having been duly made between the county aforesaid and the St. Paul, Minneapolis & Manitoba Railway Company, and filed, and the issues raised by said answer having duly come on for trial by the court without a jury, and a decision therein having been made and filed.

Now, therefore, in accordance with said decision, it is hereby adjudged and decreed that the right, title and interest of said purchasers from said railway company in and to each piece or parcel of land hereinafter described in Schedule "C" is respectively liable for taxes, penalties and costs set opposite the same, to-wit:

602

Subdivision of section, lot, or block.	Sec. or lot.	Town or block.	Rge.	Amount of taxes and penalties.	Clerk's fees and advertising.	Total amount.	Name of corporation or person interposing answer.
				Dols. Cts.	Dols. Cts.	Dols. Cts.	
Leonardsville	1	125	45	83.25	80.27	83.52	St. Paul, Minneapolis & Manitoba Railway Company.
Clifton.							
N. E. ¼	23	127	45	6.33	.27	6.60	do.
N. W. ¼	23	127	45	7.14	.27	7.41	do.
S. E. ¼	23	127	45	6.13	.27	6.40	do.
S. W. ¼	23	127	45	6.93	.27	7.20	do.
Lake Valley.							
N. W. ¼	15	127	46	.90	.27	1.17	do.
Town 129, Range 47.							
S. E. ¼	3	129	47	21.85	.27	22.12	do.

603 And the said amount of taxes, penalty and costs set down against each parcel of land is hereby declared a lien upon such piece or parcel of land as against the right, title, interest, claim or lien of whatever nature in law or equity of said purchaser from said railway company, and of every person or corporation claiming under such purchaser.

And it is adjudged that unless the amount for which each of said pieces or parcels is liable, as herein set forth, be paid the right, title and interest of said purchaser, and of every person or corporation claiming under such purchaser, in and to said parcel of land be sold as provided by law to satisfy such amount.

But it is hereby expressly adjudged and decreed that this judgment, or any sale made thereunder, shall in no wise impair or affect the title or interest of the St. Paul, Minneapolis & Manitoba Railway Company, or of any trustee or mortgagee thereof, in or to any of the above described parcels of land or any part thereof.

It is further adjudged and decreed that each and every parcel of the lands described in said Schedule "B," to-wit:

SCHEDULE "B."

Description.	Section.	Township.	Range.
Clifton, N½	33	127	45

be and the same is hereby discharged from all taxes set down against the same in the delinquent list filed in these proceedings, and from all penalties and costs.

604 Dated at Wheaton, Minnesota, this 10th day of Nov. 1897.

By the Court,

[SEAL.] H. G. MARSHALL, *Clerk.*

The contract attached to the stipulated facts herein, marked "Exhibit A," and offered and received in evidence therewith, is in words and figures following, to-wit:

(Here follows Exhibit "A," which is identical with Exhibit "B," attached to the stipulation herein, *supra*, pages ——.)

After the making and filing of said decision, and the entry of said judgment, and on the 23rd day of December, A. D. 1897, said County of Traverse, after due notice to said Saint Paul, Minneapolis and Manitoba Railway Company, duly applied to said court, before said trial judge and referee, to certify to the Supreme Court for its decision and determination, pursuant to the provisions of Section 80, Chapter 11, General Statutes of 1878, and amendments; being Section 1589, Statutes of 1894, the following points raised and presented at the trial of said proceedings by the amended answer and defense of said Saint Paul, Minneapolis and Manitoba Railway Company, and the objections made hereto by said County of Traverse, and passed upon by said court, and decided against said County of Traverse by its said decision and judgment, on the ground that said points are of great public importance and likely to arise frequently, viz.:

605 1. Were the lands described in the list attached to the amended answer of said St. Paul, Minneapolis and Manitoba Railway Company, or any portion thereof, exempt from taxation while the same were owned by the Saint Paul and Pacific Railway Company, or the First Division of the Saint Paul and Pacific Railway Company?

2. Did Chapter 6, Special Laws of 1865, entitled "An act to aid and facilitate the completion of the Saint Paul and Pacific Railroad and Branches," approved March 2, 1865, exempt from ordinary taxation the lands granted by the Act of Congress, approved March 3, 1865, entitled "An act extending the time for the completion of certain land grant railroads in the states of Minnesota and Iowa, and for other purposes," by the United States to the State of Minnesota, and by it granted to the Saint Paul and Pacific Railroad Company, by said act of the State Legislature, approved March 2, 1865, or any portion of said lands?

3. If said Chapter 6, Special Laws of 1865, exempted said lands or any portion thereof from taxation, was said act in conflict with Section 2, of Article 1, or Sections 1 or 3, of Article 9, of the State Constitution?

4. Did Chapter 9, Special Laws of 1865, entitled "An act in relation to the taxation of lands granted to the Saint Paul and Pacific Railroad Company," approved March 4, 1865, exempt from taxation the lands granted by said act of Congress, approved March 3, 1865, to the State of Minnesota, and by it granted to the Saint Paul
606 and Pacific Railroad Company, by said Chapter 6, Special Laws of 1865, or any portion thereof, and if so, was said act (Chapter 9, Special Laws of 1865) in conflict with Section 2, of Article 1, or Sections 1 or 3, of Article 9, of the State Constitution?

5. Did the Saint Paul and Pacific Railway Company and the First Division of the Saint Paul and Pacific Railway Company, or either of them, have the right, power or authority to sell, assign or convey by mortgage, trust deed or otherwise, the immunity of exemption from taxation (if such immunity ever existed) of any of the lands included in the land grants made by the acts of Congress, approved March 3, 1857, and March 3, 1865, to the Territory and State of Minnesota, and by said territory and state granted to the Minnesota and Pacific and the Saint Paul and Pacific Railroad Companies by the special acts of the territorial and state Legislatures, approved May 22, 1857, and March 2, 1865, as more fully stated by the stipulated facts herein?

6. Did the Saint Paul, Minneapolis and Manitoba Railway Company acquire this immunity of exemption from taxation of said granted lands or any part thereof (if such immunity formerly existed) by its purchase at the mortgage foreclosure sales, in the months of May and June, 1879, of the railroads, property and franchises, and said granted lands, formerly owned by the Minnesota and Pacific, the Saint Paul and Pacific or the First Division of the Saint Paul and Pacific Railway Companies?

607 7. Does Chapter 112, Special Laws of 1881, entitled "An act confirming the organization and certain purchases of the

Saint Paul, Minneapolis and Manitoba Railway Company, and in relation to the charter, powers, franchises and property of said company," approved March 7, 1881, or any law passed by the state Legislature since November 8, 1871, confer upon or confirm in said Saint Paul, Minneapolis and Manitoba Railway Company, the immunity of exemption from taxation of said granted lands, or any portion thereof, and if so, are said laws, or any or either of them in conflict with Section 2, of Article 1, Sections 1 or 3, of Article 9, or Section 32*a*, of Article 4, of the State Constitution, or with Section 1 of the fourteenth Amendment to the Constitution of the United States?

8. Is the contract entered into between the Saint Paul, Minneapolis and Manitoba Railway Company and the Great Northern Railway Company, on the 1st day of February, A. D. 1890, offered in evidence herein, a sale or transfer of the railroads and railroad property, by the Saint Paul, Minneapolis and Manitoba Railway Company to the Great Northern Railway Company, or simply a lease?

9. Does the fact that said Saint Paul, Minneapolis and Manitoba Railway Company has not operated any portions of its railroads within this state since the date of said contract, and has not paid any gross earning tax, except such as has been paid by the Great Northern Railway Company under and pursuant to the terms
608 of said contract, make and render the said granted lands, or any portion thereof subject to the ordinary mode of taxation?

10. Did the Saint Paul, Minneapolis and Manitoba Railway Company by said contract sell the said granted lands, or any portion thereof, or the entire beneficial interest therein, to the Great Northern Railway Company, so as to render said lands or any portion thereof subject to the ordinary mode of taxation?

11. Were the lands described in the list attached to the amended answer of the Saint Paul, Minneapolis and Manitoba Railway Company in this proceeding, or any portion thereof, exempt from taxation in the year 1894, at the time when the taxes sought to be enforced in this proceeding were assessed thereon?

12. Is the Saint Paul, Minneapolis and Manitoba Railway Company entitled to the relief demanded in its amended answer herein, or to the relief granted to it by the decision and judgment herein, or to any relief?

Now, in the opinion of the court, said points are of great public importance, and likely to arise frequently, and upon the said application of the said County of Traverse the same, and each and all of them, are hereby certified and reported to the Supreme Court of this state for its decision and determination, together with all the facts established and evidence given in said proceedings bearing on said point.

609 This is to certify that the foregoing is a correct statement and transcript of all the proceedings had, and all the facts established in this court, in the proceedings therein entitled, bearing on the points hereinbefore stated and enumerated, including all the

evidence offered and given at the trial of said proceedings in this court.

Given under my hand, this 30th day of December, A. D. 1897.

GORHAM POWERS,
District Judge.

STATE OF MINNESOTA,
County of Traverse:

District Court, Sixteenth Judicial District.

COUNTY OF TRAVERSE, Plaintiff,
vs.
THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, Defendant.

Stipulation.

In the Matter of the Proceedings to Enforce Payment of Taxes on Real Estate Remaining Delinquent on the First Monday in January, 1896, in the County of Traverse, State of Minnesota.

It is hereby stipulated and agreed by and between the parties hereto that the foregoing is a correct statement and transcript
610 of all the proceedings had and evidence submitted at the trial of the above entitled proceedings, and that the same may be submitted and signed by the court as the settled case without further notice to either party.

Dated Dec. 22nd, 1897.

F. J. STEIDL,
Attorney for Traverse County.
R. A. WILKINSON AND
JNO. L. SNAPP,
Attorneys for St. Paul, Minneapolis & Manitoba Railway Company.

10978.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

No. 36.

COUNTY OF TRAVERSE, Plaintiff,
vs.
THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, Defendant.

Syllabus.

Railway—*Exception* of "First Division" from Taxation Appurtenant to Road and Transferable.

The exemption of the road and land grant of the First Division of the St. Paul & Pacific Railway Company from ordinary
611 taxation, in consideration of the payment to the state of a percentage of the gross earnings of its road (see First Division

v. Parcher, 14 Minn. 224 (297), was not a mere personal privilege to that company, but was appurtenant to the line of road and the lands, and transferable to any other company which might acquire the road and assume its operation; and the transfer of the road and land grant to such company did not amount to a sale of the lands, within the meaning of Laws 1857 (Ex. Sess.) c. 1, and Sp. Laws 1865, cc. 6, 9; following former decisions.

Same—Benefits and Burdens Passed to Manitoba Company.

This immunity, with its reciprocal burdens passed to the St. P., M. & M. Ry. Co. by purchase on the foreclosure of a mortgage executed by the First Division Co. on its road, lands, franchises, immunities and exemptions.

Same—Additional Grant of 1865 Included.

This immunity applied to the "additional" Congressional grant of March 3, 1865, as well as to the original grant of March 3, 1857.

Lease to Great Northern Not a Sale of Lands.

A certain lease and contract between the St. P., M. & M. Ry. Co. and the G. N. Ry. Co. construed, and held not to constitute a sale of the lands, within the meaning of Sp. Laws 1865, cc. 6, 9.

(Here follows the opinion of the Supreme Court, which appears in the report thereof in Vol. 73 Minn. pp. 417ff.)

(Duly certified by the Clerk of Supreme Court of Minnesota.)

612 DEFENDANT'S EXHIBIT 38.

An Act to Incorporate the Minneapolis and Saint Cloud Railroad Company.

(March 1, 1856.)

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

SECTION 1. John H. Stevens, William Hanson, Franklin Steele, Alfred E. Ames, R. P. Russell, J. P. Wilson, J. L. Crocker, George F. Brott, J. M. Winslow, A. M. Fridley, John Banfil, and all such other persons as shall hereafter become stockholders in the company hereby incorporated, shall be and are hereby made a body politic and corporate, by the name and style of the "Minneapolis and Saint Cloud Railroad Company," and by and under that name and style shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against in law and equity, in any and all courts and places whatsoever, as fully as natural persons; and the said corporation may make and use a common seal, and alter and renew the same at pleasure, and by their corporate name and style shall be capable of contracting and being contracted with, and by acquiring by purchase, gift, grant, devise or otherwise,

and of holding and conveying all such estate and property, real and personal, as may be necessary or convenient to carry into effect the object and purposes of this act and of the said corporation.

SEC. 2. The said corporation is hereby authorized and em-
613 powered, and it is hereby declared to be the objects and purposes thereof, to survey, locate, construct, complete, maintain, use and operate, and at their pleasure alter the line thereof, a railroad with one or more tracks or lines of rails, from a point to be selected by this company in Minneapolis, in the county of Hennepin, in the territory of Minnesota, by the most feasible and practicable route to Saint Cloud, in the county of Stearns, on the Mississippi river; and also a main line of road by way of Mille Lac to a point at or near the mouth of the Saint Louis river, together with all necessary and proper stations, depots, turnouts, engines, cars and other appurtenances and furniture of a railroad.

SEC. 3. The capital stock of the corporation hereby created shall be two millions of dollars, and shall be divided into shares of one hundred dollars each, which shall be deemed personal property and shall be transferable in such manner as the corporation by its regulations or by-laws shall prescribe, but no share of said stock shall be transferred while there shall be any instalments assessed thereon unpaid, and the directors of said corporation may, with the consent of the holders of a majority of the stock thereof, increase the capital stock thereof to such sum as may be necessary or convenient to carry into effect all the rights and privileges hereby granted thereto, not exceeding thirty millions of dollars. The shares of any increase of stock shall be the same and transferable in the same manner, as the shares of the original stock.

614 SEC. 4. The said company is hereby authorized to borrow money to be expended in the construction and equipment of their said road and appendages, and to issue bonds for the payment thereof in the usual form; such bonds not to exceed in the aggregate at the period of the completion of said road, three-fourths of the whole amount actually expended on said road and its appendages aforesaid; and may make and execute in the corporate name of said company all necessary mortgages, writings, notes, bonds or other papers, for any liability that it may incur in the construction or equipment of said road.

SEC. 5. The said company is hereby authorized and empowered to construct their said railroad and its branches in sections as fast as they may obtain the means for so doing; and the franchise of the portions so completed and put in operation shall vest in said company the same as though the whole was completed.

SEC. 6. Said company is hereby authorized and empowered to connect its road by branches with the road of any railroad company or companies in the territory or future state of Minnesota, that are now chartered or may hereafter be chartered, or to become part owner or lessee of any railroad in said territory, and any railroad company in said territory of Minnesota, duly organized, or which may hereafter be organized, under the laws of said territory or future state of Minnesota, may connect its road with the road of said company, and

may in like manner with the consent of said company be-
615 come part owner or lessee of the road of said company, or of any of its branches, or any portion thereof, situated in this territory, and the said company are hereby authorized and empowered to run a branch of said road from Minneapolis, by way of West St. Paul, to some point to be selected by said company on the Iowa state line.

SEC. 7. The said corporation shall have the right of way upon and may appropriate to its own use and control, for the purpose of the said railroad and its appurtenances, land not exceeding two hundred feet in width throughout its entire length, and may, by its engineers, agents and contractors, enter upon and take possession of, and use all and singular, any lands, streams, timber and materials of any and every kind, for the purpose of making the survey and location of said railroad; and of all stations, depots, turnouts and other things necessary, proper or convenient for the same, and the full use and protection thereof, and of all its appendages and appurtenances.

SEC. 8. The said corporation may take and hold for the said purposes, or any of them, such additional lands as may be requisite or convenient therefor; but unless such lands taken by said corporation for any of said purposes shall be purchased of, or voluntarily given by, the owner or owners thereof, full and proper compensation therefor shall be made by said corporation to the owner or owners thereof, which compensation shall be ascertained and determined in the manner following:

The said party or parties interested may present to a court,
616 in the county in which the lands or real estate proposed to be taken shall be situate, having jurisdiction competent to entertain, adjudicate and determine questions of title to real estate, a petition signed by him or them, describing with reasonable certainty and accuracy by map, plat, survey or otherwise, the lands or real estate so proposed or required to be taken, and setting forth the name of each and every owner, incumbrancer, and other person interested in the same or any part thereof, so far as the same can be ascertained by the legal records affecting the same, and by view of the premises, or other inquiry touching the occupation thereof, and praying the appointing of three competent, disinterested persons, who shall be freeholders in said county, as commissioners to ascertain and determine the compensation to be made to the said owner or owners, respectively, and to all tenants, incumbrancers, and others interested for the taking or injuriously affecting such land or real estate. A copy of such petition, with a notice of the time and place when and where the same will be presented to the court, shall be served on each and every person named therein as owner, incumbrancer, tenant or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering such copy of petition and notice to each of the persons so named therein, if a resident of this territory, or, in case of the absence of such person,

by leaving such copy of petition and notice at his or her
617 usual place of abode, with some person of sufficient age and understanding to comprehend the object thereof, which shall be communicated to such person, with a request to deliver the same to the individual for whom it is thus left at the earliest opportunity. In case there shall be any persons named in such petition who are not residents of this territory, and upon whom service cannot be made in the manner above prescribed, a notice stating briefly the objects of the petition, a description of the lands proposed to be taken and the time and place of presenting the petition to the court, and directed to such person or persons, shall be published in the newspaper nearest the location of such lands, and in a newspaper published at the seat of government of the territory or state in which the lands shall be situate, once in each week for six consecutive weeks previous to the time designated for presenting such petition. The court to whom such petition shall be presented shall not make any order for the appointment of commissioners to ascertain and determine the compensation to be paid to any owner or person who shall not appear in person or by attorney or counsel, except upon proof by affidavit, and to the satisfaction of the court, of the service of the petition and notice in the manner hereinbefore prescribed, but may do so upon the appearance of the party or parties, or upon such proof of service in the absence of a party or parties. The court may, upon the application of the said corporation, or of any owner or party interested, for reasonable causes adjourn the proceedings from
618 time to time, and may order new or further notice to be given to any party whose interest may be affected thereby. When the court shall have proof satisfactory that all parties interested in any parcel of land have been duly served with the petition and notice in the manner herein prescribed, and of the nature and extent of the interest or estate of each and every party in the same, the court may make an order, to be recorded in the minutes thereof, appointing three disinterested, competent persons commissioners to ascertain and determine the amount to be paid by the said corporation to each of such persons, as compensation for his interest or estate in such parcel or parcels of land, specifying the time and place of the first meeting of such commissioners. Said corporation shall without delay procure and deliver to each of such commissioners a copy of such order. Before the said commissioners shall enter upon the discharge of their duties they shall respectively take and subscribe an oath that they will faithfully and impartially, and without fear, favor, reward or the hope or promise of reward, discharge their duties as commissioners to ascertain and determine the compensation to be paid by the Minneapolis and Saint Cloud Railroad Company (here insert the names of the person whose property is to be appraised) for lands or interest in lands to be taken for the use of said company. Such oath may be taken before any officer authorized by law to administer oaths. Whenever the place of any commissioner shall become vacant, the court may, upon
619 such notice to the parties as he may prescribe, and by like order, supply the place by the appointment of another person

as such commissioner, who shall be in like manner served with a copy of the order appointing him, and take the like oath. The commissioners shall meet at the time and place specified in the order appointing them, and in the order supplying any vacancy in such commission. When met and all present (they) may proceed to the hearing of the proofs and allegations of the parties present, or reasonably notified by the company to be present, and authorized to administer oaths to witnesses before them; and before making any report they shall, if requested by the party interested, or by either of their number, view the premises for which compensation is to be made, and the amount of which they are to determine. The commissioners may, as the exigency of any case or the convenience of the parties or themselves may require, adjourn from time to time and to such places as may, in their judgment, be most conducive to the purpose of their investigations. No proceedings shall be had by the said commissioners unless all of them be present, except to adjourn, but any and every question submitted to them may be decided by a majority, and shall be valid. The said commissioners shall keep minutes in writing of all their proceedings, in which they shall enter the time and place of their meetings and adjournments, the names of parties appearing before them in person or by attorney, the substance of the testimony of witnesses sworn and ex-
620 amined before them, and all disputed questions which shall be submitted to them, and their decisions thereon. They shall make and sign a report, which shall contain a description by metes and bounds, survey, map or plat of each separate parcel of land proposed to be taken by the said company for its use, and the compensation for which they shall ascertain and determine the amount (if anything) to be paid by said company to each person whose interests are to be affected thereby. They shall, as soon as their report shall be made, attach thereto their minutes and the oaths of office and file the same in the office of the clerk of the court appointing the said commissioners and notify the parties interested in such report that the same is made and filed. In case the said company or any person interested in such report shall deem the same unjust in any manner affecting the amount of the compensation to be paid, the company or such party may appeal therefrom at any time within twenty days after the service of notice of filing of said report. The party appealing shall file a notice of such appeal with the clerk of the court with whom the report shall have been filed, stating the grounds of the appeal, and serve a copy thereof on the opposite party, within the time above prescribed for taking appeal, and by giving a bond in such penalty as the judges of the same court shall prescribe, conditioned to prosecute the appeal without unnecessary delay, to abide the order the court may make on such appeal, and pay the costs of appeal if he shall fail to sustain the grounds of error or injustice prescribed in his notice of appeal. Upon
621 the filing of the notice and bond for appeal with proof by affidavit of the service of such appeal as above prescribed, all further proceedings on the report shall be stayed until the further order of the court, and the cause upon such appeal shall be entered

proceeded in and determined in the same manner as cases on appeal from courts of justices of the peace; and in case the appeal shall involve the determination of any question of fact, the same shall be tried by jury, unless the jury shall be waived by both parties. The report of the commissioners shall be final and conclusive unless appealed from in the manner above prescribed. Whenever the company shall take an appeal from any report of commissioners, such appeal shall not stay the work on the road or other structure on the premises or lands involved in the appeal, provided the company shall deposit in court the amount awarded or assessed by the report, or part or portion of the report, appealed from, to abide the order to be made by the court on the appeal. An appeal from any report, or part or portion of a report, of commissioners by or on the part of any person interested in any parcel of land or real estate proposed to be taken by the company, shall stay all work on the road or other structure on the premises in question, unless the company shall deposit in court the amount of money claimed by such appellant before the commissioners, to abide the order of the court on the said appeal. Whenever any report or part of report of commissioners shall have become final, and whenever any appeal from such a report
622 shall have (been) finally determined, the said corporation shall, upon the payment to each party interested the sum thereby determined to be due to him or her as a compensation for property taken, or deposit the same in the court for his or her use, become invested and seized of the title to the lands or real estate for which such payment or deposit shall have been made, and entitled to full, free and perfect use and occupation of the same for the purposes aforesaid, which are, for all the objects of this act, hereby declared to be public purposes. The said commissioners shall be entitled to receive three dollars per day for their services; and their compensation, and all the fees of officers previous to and including the filing of the report of the commissioners, shall be paid by the said company. In case the title thus acquired to any lands by the said company for their use in the manner hereinbefore mentioned or otherwise, shall prove defective, they are hereby authorized to take the proceedings prescribed in this section to procure the title from the real owner.

SEC. 9. If the incorporators named in this act determine to accept this charter, they shall appoint three or more of their number, and such other person or persons as they may deem proper, as agents or commissioners, to receive the subscriptions to the stock of this corporation, and direct the times and places when and where the books for receiving such subscription will be opened; and such books may be opened by different agents or commissioners, at different
623 places at the same time. Every person who shall subscribe for any stock of this corporation shall, at the time of subscribing, pay to the agent or commissioners two per cent. on the amount of stock so subscribed.

SEC. 10. Whenever a hundred thousand dollars shall have been subscribed to the stock of this corporation, and two per cent. thereon paid as aforesaid, the stockholders shall meet in person or by proxy,

at such time and place as the holders of a majority of the stock shall prescribe, and proceed to elect twelve directors from among the stockholders, each share of stock being entitled to one vote by the holder thereof, which shall be cast in person or by proxy. The directors shall elect one of their number to be president of the board of directors, and he shall preside at all the meetings thereof at which he shall be present. The directors shall also elect one of their number a vice president, who shall preside in the absence of the president. The directors shall also elect some suitable and competent person to be secretary. They shall also elect a treasurer, who shall give such security for the safe keeping and payment of the moneys of the company as the directors may require. At a meeting of the directors, seven shall form a quorum for the transaction of business; and all the affairs and business of the said company shall be conducted by or under the directions of the board of directors, and they are authorized for the purposes specified in this act to make and establish
regulations and by-laws, and to do all things necessary to
624 be done, and not inconsistent with the constitution and laws
of the United States or by the laws of this territory, or this act.

The directors first elected shall by lot divide into three classes. The first class shall hold their offices one year, and until their successors shall be elected and enter upon their duties; the second class shall hold their offices two years, until their successors be elected and enter upon their duties; and the third class shall hold their offices three years and until their successors are elected and enter upon their duties; and thereafter there shall annually be elected, in the manner hereinbefore specified, four directors of the said corporation, who shall hold their offices three years and until their successors shall be elected and enter upon their duties. Vacancies which may from any cause occur in said board of directors may be filled by appointment by the majority of the directors in office; and such appointment shall continue until the next annual election of directors when all vacancies shall be filled by election. The annual election shall be held at the office of the secretary of said company, and the secretary and two disinterested persons, to be appointed by the board of directors, shall be the inspectors of elections, and shall canvass the votes, and make and sign a certificate of the result, and the secretary shall immediately notify the persons elected of their election.

SEC. 11. The board of directors may, at such time as they may
deem necessary or proper, assess upon the stock subscribed an
625 instalment of not less than five or more than twenty per cent.,
and require payment of such instalment within a reasonable time, not less than thirty days from notice thereof, under the penalty of a forfeiture of the stock upon which the assessment was made.

SEC. 12. The said corporation shall locate at least thirty miles of said road between Minneapolis and Saint Cloud (by way of Manhattan) and commence work thereon within two years from the time this act shall take effect, and shall complete and equip at least one

track from Minneapolis and Saint Cloud, with suitable and safe switches and turnouts, within seven years from the same time; and the said corporation are hereby authorized and empowered to connect with any railroad running in the same direction with this road, and where there may be any portion of another road which may be used by this company. This company shall not be bound to build such portions of road so long as they may use the portions of any other road which may answer the same purpose.

SEC. 13. For the purpose of constructing and using said railroad, the said corporation is authorized to construct their said railroad and the necessary bridges across and over public highways and navigable streams; provided, that it be so done as not to obstruct the highways, or to materially obstruct or impede the navigation of any navigable stream. And the said corporation is hereby authorized to contract with any other railroad company or corporation with whose road their road may come in contact for the crossing or connection
626 of such roads, and for the joint use thereof.

SEC. 14. If any person shall wilfully obstruct or in any way injure, spoil or destroy the railroad, or any part of the railroad, or anything affixed or appurtenant thereto, and necessary or convenient for its free and safe use, or any of the materials for the construction thereof, or any building, fixture, or other structure, or carriage, engine, or car, erected or kept for the use thereof, such person shall be deemed guilty of a misdemeanor, and liable to be indicted and punished therefor in the territorial prison, for not more than ten years and for not less than five years, and shall also be liable to pay the company twice the amount of the damage occasioned thereby. And in case the death of any person shall be produced by or in consequence of any wilful or malicious obstruction or injury to the said railroad, or to any engine or car thereon, the person who shall so obstruct or injure the said railroad, or car, or engine thereon, shall be deemed guilty of murder in the second degree.

SEC. 15. Every conductor, baggage master or other agent or servant of the said company, and who shall be engaged in the ticket office, or on the cars on said railroad, shall wear upon his hat or cap a plain badge, which shall indicate his office or station; and no conductor or collector shall demand or be entitled to receive any fare or toll from any freighter or passenger, or exercise any control or direction in his station, or to be authorized or allowed to interfere with any passenger, baggage or freight, without wearing such badge.

627 SEC. 16. Every locomotive engine on said railroad shall be furnished with a good and sufficient alarm bell or whistle, and be fully sounded at least eighty rods distant from every highway crossing, while the engine, either with or without a train of cars, shall be passing over said road; and for every violation of this section the said company shall forfeit and pay to whomsoever shall prosecute for the same, the sum of one hundred dollars.

SEC. 17. This act is hereby declared to be a public act, and may

be amended by any subsequent legislative assembly, in any manner not destroying or impairing the vested rights of said corporation.

SEC. 18. This act shall take effect immediately after its passage.

CHARLES GARDNER,
Speaker of the House of Representatives.
JOHN B. BRISBIN,
President of the Council.

Approved March 1, 1856.

628 DEFENDANT'S EXHIBIT 39.

An Act to Amend an Act Entitled "An Act to Incorporate the Minneapolis and St. Cloud Railroad Company," Approved March First, 1856, and to Repeal Certain Portions of an Act Amending the Charter of said Company, Passed February 23, 1864.

(February 28, 1865.)

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That whereas, the incorporators or persons named in the first section of the act of the legislature of the late territory of Minnesota, entitled "An act to incorporate the Minneapolis and St. Cloud Railroad Company and approved March first, 1856," did, in the manner prescribed by said act, open books and receive subscription to the capital stock of said railroad company to an amount exceeding one hundred thousand dollars, upon which said stock so subscribed, the amount or sum of two per cent. was actually paid in on or before the 15th day of March, 1857. And whereas, the said stockholders of said company have ever preserved and maintained the status given to them by their said several subscriptions and payments (no further assessments having been made on the said stock), and whereas, the holders of said stock have since organized said company by the election of a board of directors, and the other
629 officers named in said act, in the manner therein pointed out, and have received additional subscriptions to the capital stock of said company, upon all of which, two per cent. thereof has been actually paid into the treasury of said company, and said company is and ever has been desirous of availing themselves of all the franchises granted by said act. And whereas, without the consent of said stockholders, or said company, the legislature of the State of Minnesota, by an act approved February 23, 1864, and entitled "An act to amend an act entitled 'an act to incorporate the Minneapolis and St. Cloud Railroad Company' passed March 1, 1856," did undertake to amend said first mentioned act by inserting as corporators persons other than those named as corporators in said first mentioned or original act, and other than the stockholders aforesaid; and did, also, in said amendatory act, in like manner declare the said persons named therein, their assigns, survivors, and each of them, directors of said Minneapolis and St. Cloud Railroad Company, or said corporation, for the term of one year from the passage of said

amendatory act, and until one hundred thousand dollars — stock should be subscribed and taken, when the holders of the stock so subscribed and taken were directed to choose a new directory, and to organize in the manner set forth in said original act, and also directing said persons therein named as such directors to choose all the other officers pertaining to said company, and empowering them to act as such until superseded by the directors chosen by the said
630 stockholders, with a proviso, however, that the said persons named in said amendatory act should accept the charter as thus amended, by organizing for the purpose of executing and carrying the same into effect within six months from the passage thereof; and whereas, no stock has ever been subscribed to the capital stock of said railroad company under or pursuant to, or by virtue of said amendatory act. Therefore, the first and third sections of said amendatory act are, and each of them is hereby repealed, and all power or authority conferred or attempted to be conferred by said sections or either of them, as against the incorporators, or persons named in the act thereby amended, or their associates, successors, or the organization in this act first named, is hereby revoked and annulled.

SEC. 2. The first section of said act, entitled "An act to incorporate the Minneapolis & St. Cloud Railroad Company," passed March 1, 1856, is hereby re-enacted the same as if it was here repeated at length; but the re-enactment thereof shall not in any manner injuriously affect the organization of said company first mentioned and referred to in this act, which said organization of said company is hereby in all respects legalized and confirmed, and declared to be the only legal representative of said company or corporation, and shall be recognized and treated as such in all courts or tribunals in this state or elsewhere; and the several directors and officers thereof, of said organization, and their successors shall, whenever it shall or may become necessary or important to the interests of said company, be deemed the successors of the persons named as
631 directors in said amendatory act, and of each and every of the officers by said persons chosen under the provisions of said amendatory act. Provided, that no provision in this act or the act to which this act is an amendment shall be so construed as to interfere with the rights, privileges and franchises of any other land grant railroad company in this state existing at the time of the passage of this act or of the act to which this is an amendment.

SEC. 3. That the twelfth section of the said act entitled "An act to incorporate the Minneapolis & St. Cloud Railroad Company" approved March 1, 1856, is hereby re-enacted and amended so as to read as follows:

"SEC. 12. The said corporation is hereby authorized and empowered to connect with or adopt as its own, on such terms as may be agreed upon, between the parties or companies interested, any other railroad running in the same general direction with either of its main lines, or any branch road which said corporation is authorized to construct, and where there may be any portion of another railroad which may be so used by this company or corporation, it

shall not be bound to build such portion of its own road or branches so long as it may use the portion of any other road which may answer the same purpose."

SEC. 4. That section two of said charter or incorporating act is hereby amended by striking out the words "by way of Mille Lac" where they occur in said section.

632 SEC. 5. That section ten of said act, incorporating said company, is hereby amended by adding thereto the following:

"The said board of directors shall have power at any meeting thereof, upon the written request of the holders of a majority of the stock, to increase or diminish the number of directors therein; provided, however that any change so made shall equally affect each class of directors herein provided for; and, in case the number is at any time reduced by virtue hereof, that the director or directors who shall go out of office shall, unless otherwise agreed upon, be determined by lot, by the directors belonging to either class, if they shall be present, and if any one or more shall be absent, the presiding officer at said meeting may appoint some stockholder to act for such absent director. A majority of the directors of the board, after any such change, shall constitute a quorum for the transaction of business."

SEC. 6. The said Minneapolis & St. Cloud Railroad Company shall also have power in such manner as may be provided by resolution of its board of directors to open books and receive subscriptions for stock pertaining solely to any one or more of its main lines, or branch roads, or to any portion of either, in any amount necessary and within the limits prescribed by its charter, and to provide for issuing certificates therefor; and whenever fifty thousand dollars of stock shall be so subscribed the said stockholders may meet in person or by proxy, at such time and place as said company

633 shall have prescribed, or a majority of the holders of said stock may prescribe, and proceed to elect a sub-board of directors, not exceeding nine nor less than five in number, each share of said stock being entitled to one vote by the holder thereof; which shall be cast in person or by written proxy. The said sub-directors shall elect one of their number to be president of said sub-board of directors, and he shall preside at all the meetings thereof at which he shall be present. The said directors shall also elect one of their number vice-president of said sub-board, who shall preside in the absence of the president. They shall also elect some suitable person to be secretary, and some suitable person to be treasurer, who shall give such security for the payment of the moneys entrusted to him as such officer, as the directors may from time to time require. A majority of said sub-contractors shall form a quorum for the transaction of business. All the affairs of the said Minneapolis and St. Cloud Railroad Company, pertaining to the line or branch, for the construction of which said stock may be subscribed as aforesaid, shall be conducted by or under the direction of said sub-board of directors, and their successors in office, after the organization of said sub-board; and the said sub-board are hereby authorized for the purposes in this section specified to make and establish regulations and

by-laws for their government, and the government of the line or branch to which their said stock may pertain as aforesaid, and shall have and may exercise all the powers over said line or branch
634 which the board of directors of the said Minneapolis and St. Cloud Railroad Company could have exercised over the same had such sub-board of directors not been organized; and may do all things necessary to be done in the premises, not inconsistent with the laws of the state or the charter of said company or of this act. The number of sub-directors which shall constitute said sub-board after the first organization, their terms of office, the terms of office of each of the other officers herein provided for, and the manner of filling vacancies, shall be regulated by the stockholders, and their compensation by said sub-board. From and after the organization of such sub-board of directors, all the rights, privileges, franchises and immunities granted by this or any other act of the legislature of the state or territory, to said Minneapolis and St. Cloud Railroad Company pertaining to the line or branch for which said sub-board of directors may be organized, as aforesaid, and all right, title, interest or claim of said company in and to all lands granted by any act of the legislature and also pertaining to said line or branch shall vest in said sub-board of directors for the use and benefit of the stockholders represented by said sub-board; but the said Minneapolis and St. Cloud Railroad Company shall remain vested with all its other rights, powers, privileges, franchises, lands and other property. The said sub-board may adopt by resolution any name which may designate the particular line or branch of road which they may propose to construct, and by and under such name the stockholders
635 in said line or branch shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against in law or equity, in any and all courts or tribunals as fully as natural persons; and may make and use a common seal, and alter and renew the same at pleasure, and by said name and style shall be capable of contracting and being contracted with, and of acquiring by purchase, gift, grant or otherwise, and of holding and conveying all such estate and property, real and personal, as may be necessary or convenient to carry into effect the object and purposes of this section and of the said Minneapolis and St. Cloud Railroad Company, so far as may concern said line or branch. And neither the stockholders mentioned in this section, nor the line, road or branch which they may construct by virtue hereof, shall be liable for any debt or liability contracted by said Minneapolis and St. Cloud Railroad Company, after the organization of said sub-board of directors, or said sub-company; nor shall any of said stockholders be liable on stock subscribed or held by them for debts, or liabilities incurred after he shall have transferred the same; nor shall said Minneapolis and St. Cloud Railroad Company be held to answer for any debt, demand or liability incurred by or under the management of any sub-board of directors authorized by this section, except it should become a stockholder therein and then only to the same extent as other stockholders in said line or branch.

636 SEC. 7. That any association of persons, corporation or alleged corporation, to whom or to which any legislature of the state or late territory of Minnesota, have granted or shall grant any swamp lands, or the right, title, interest or claim of the state or said territory in or to any lands donated by the Congress of the United States to the said territory or state to aid in the construction of any railroad or line of railroad where or over a route which the said Minneapolis and St. Cloud Railroad Company is authorized by its charter to build and construct, either a main line or branch railroad may, and is hereby authorized, by deed authorized by vote of the board of directors of such association, company or corporation, duly signed by the president and sealed with the corporate seal thereof, if such association, company or corporation shall have adopted a seal to surrender or transfer to said Minneapolis and St. Cloud Railroad Company, or to any branch or line thereof then having a separate organization, or sub-board of directors, as provided by this act, all the right, title, interest and claim of such association, company or corporation to any or all lands so granted and applicable or pertaining to said line or branch road, or to any part thereof. And the said Minneapolis and St. Cloud Railroad Company, and each line or branch thereof having a separate organization as in this act provided, are, and each of them is hereby made capable of accepting and receiving such surrender or transfer of any such grant of lands, or the interest of the territory or state therein, and of acquir-
637 ing title to said lands upon the same terms and conditions as were or may be imposed on the original grantees or association, company or corporation so surrendering such grant, lands or interest, except that the time or times which may be limited by such original grant for grading or completing the road or line to which said grant may apply, shall commence to run from the date of the said surrender or transfer. And the governor of the state is hereby authorized and required after such surrender, when notification thereof is filed in the office of the secretary of state, to deal in all things concerning said grant with said Minneapolis and St. Cloud Railroad Company, or the line or branch thereof to whom or to which said surrender shall be made as aforesaid; and to that end he is hereby authorized and required upon proper written demand, to convey from time to time directly to said company, or the separate line or branch thereof entitled thereto, all the lands embraced in said grant and surrender to which said company, line or branch may become entitled by virtue hereof, and of said original grant, the same as he may have been authorized to convey to said original grantee or grantees, had such surrender not been made.

SEC. 8. The said the Minneapolis & St. Cloud Railroad Company and each of its branches being organized as aforesaid, shall have power to consolidate the whole or any portion of its capital stock with the capital stock or any portion thereof, of the road or branch road of any other railroad, corporation or company, having
638 the same general direction or location, or to become merged therein by way of substitution, upon such terms or conditions as the two companies may agree, by the consent of a majority of the

stockholders of each company, and the two companies, when such consolidation has been made, shall control and manage by the board of directors of both companies acting jointly, such consolidated road, until the first election of directors of said consolidating companies, when the stockholders of said companies, shall choose at such time and place as they shall agree upon, a board of directors not to exceed eleven in number, who shall have power to adopt a name for such consolidated road, and, by which they shall be known and recognized; to adopt a common seal; to sue and be sued; contract and be contracted with; and shall have and enjoy all and singular the rights, right of way, privileges and immunities of said consolidating companies or either of them, as to such consolidated line before consolidation, which said agreement of consolidation, shall be in writing, signed by the president of said consolidating companies respectively, and a copy thereof filed in the office of the secretary of state.

SEC. 9. The said Minneapolis & St. Cloud Railroad Company may consolidate any portion of its road and property, and each branch being organized as aforesaid, may consolidate the whole or any portion of its branch road and property, with the branches of any other railroad company or any portion thereof, upon such
639 terms and conditions as said companies, or a majority of the directors thereof, with the consent of the holders of a majority of the stock, respectively, may agree.

Provided, that said consolidated road shall not be affected by or subject to any liens, judgments, deed of trust or mortgage, created upon or growing out of any subsequent agreements, liabilities or transactions connected with any other portion of said Minneapolis & St. Cloud Railroad, or of the road or branch with which it may be so consolidated.

SEC. 10. The Minneapolis & St. Cloud Railroad Company and each of its branches organized as herein provided, shall have power to create and issue in such manner and on such terms as it may deem expedient, one or more classes of preferred stock and special stock, and to make such agreements as it may deem proper with the respective holders thereof as to the dividends thereon, and the securities for such dividends, and to make such agreements as it may deem proper with the holders of any special or preferred stock for the appropriation of the net earnings of any portion of the railroad which it may construct or otherwise acquire, to the payment of dividends on such stock as may be issued in respect thereto, which appropriation, as made by such agreement, shall be effectual to secure to the said and future holders of such stock the application of such net earnings as in the said agreement provided, against any future act of the company or branch or any of its general liabilities. And the said company or branches may make such agreement as it
640 may deem proper with the holders of any such special stock as to the administration of the portion of said railroad and any land grant appertaining thereto to which said stock may pertain and for the separate organization of the holders of such special stock for the purpose of that administration and enabling them or directors chosen by them separately or in conjunction with the other

directors, to exercise in respect to the portion of the road to which such special stock may pertain all the powers of the company subject to the provisions of such agreement when made and entered into.

SEC. 11. The Minneapolis & St. Cloud Railroad Company and each of its branches so organized, shall have power to provide in any mortgage or deed of trust which it may issue covering any portion of its road now built, or hereafter to be built, that the holders of the bonds, secured by such deeds of trust or mortgage, shall have the right to vote at any meetings held for the election of directors of said company or branch or for any other purpose, and such voting power to be to such extent as may be provided for, either in such deed of trust or mortgage, or in the bonds issued by said company. And all meetings both of directors or stockholders of said company or branch, may be held either within or without the state of Minnesota, or any of the United States, in the city of London, England, or any foreign state or country, as shall be provided for by the by-laws of said company or branch, and all or any of the directors may
641 be residents of the city of London aforesaid, or of any foreign country.

SEC. 12. The Minneapolis & St. Cloud Railroad Company, and each branch thereof having a separate organization as above provided for, may consolidate the whole or any portion of its main lines or branch railroads and all the property, rights, powers, franchises, grants and effects pertaining to such roads with the rights, powers, franchises, grants and effects of any other railroad company either within or without this state, upon such terms and conditions as such company or branch organization, or a majority of the directors thereof may respectively agree, and the railroad company in which such railroad shall become vested by such consolidation, shall thereafter hold and enjoy all rights, grants and powers and franchises in respect to such with the company or branch possessed before the consolidation, but the said Minneapolis & St. Cloud Railroad Company or branch organization thereof shall remain vested with all its other rights, powers, privileges and franchises.

SEC. 13. This act shall take effect from and after its passage.

Approved February 28, 1865.

642 DEFENDANT'S EXHIBIT 40.

An Act to Amend the Charter of the Minneapolis and St. Cloud Railroad Company.

(March 2, 1870.)

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That in consideration of an annual payment of a per centum upon the gross earnings of the Minneapolis and St. Cloud Railroad as herein provided, the road, its appurtenances and appendages, and all other property, estate and effects of the Minneapolis and St. Cloud Railroad Company, which they have already

acquired or which they may hereafter acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all assessments and taxation; and in consideration of the grants made to and privileges and franchises conferred upon said company, and of the exemption contained in this section, the said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March of each and every year, pay into the treasury of the state one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after the said railroad shall be completed and in operation, and shall, during the seven
643 years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this state on or before the first day of March of each and every year, two per cent. on the gross earnings of said railroad; and shall, from and after the expiration of ten years from the completion of thirty miles of said railroad, on or before the first day of March of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad. And the payment of per centum annually as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this state on or before the first day of February in each year, the truth of which abstracts shall be verified by affidavits of the secretary and treasurer of said company; and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstract, full power is hereby vested in the governor of this state or any other person appointed by law to examine under oath the officers and employes of said company or other persons and if any person so examined by the governor or other authorized person, shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the state the payment of the aforesaid per centum, it is hereby declared that the state shall have a lien
644 upon the railroad of said company and upon all the property, estate and effects of said company whatever, real, personal or mixed; and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company.

SEC. 2. The provisions of the foregoing section are hereby extended to the said Minneapolis and St. Cloud Railroad and all its branches.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved March 2, 1870.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

I hereby certify that I have examined the foregoing transcript, consisting of 681 typewrit-en pages and have found the same to contain all the evidence produced on the trial of the above entitled cause, all offers of evidence and rulings thereon, and all other proceedings had or taken on said trial; and I further certify that the same is in all respects conformable to the truth. Said trans-
645 script is hereby signed and allowed and ordered to stand and be filed as and for the settled case in said action.

Dated Aug. 29th, 1908.

OLIN B. LEWIS,
Judge of said District Court.

(Title of Cause.)

Findings of Fact, Conclusions of Law, and Order for Judgment.

This cause came duly on and was tried before said Court at the General Term, November, 1907; Honorable E. T. Young, Attorney General, and Mr. Royal A. Stone, Assistant Attorney General, appeared in behalf of the State of Minnesota, and Mr. William R. Begg, General Solicitor, appeared for the Great Northern Railway Company.

Upon the evidence adduced and stipulation of parties, the Court finds the facts to be in all things as set forth in Exhibit "A," hereto attached and made part hereof.

Since June 1879, the St. Paul, Minneapolis & Manitoba Railway Company has constructed and put into operation, and leased to the defendant, the Great Northern Railway Company, as set forth in the stipulation, made part of these findings, the following branches, commencing with and extending from the original lines described in the charter of the Minnesota & Pacific Railroad Company, viz:

1. Osseo Junction to St. Cloud, 66.33 miles.
646 2. Elk River to Milaca, 31.80 miles.
3. East St. Cloud to Hinckley, 66.38 miles.
4. St. Cloud to Wilmar, 55.70 miles.
5. Sauk Center to Park Rapids, 90.60 miles.
6. Fergus Falls to Pelican Rapids, 21.65 miles.
7. Wayzata to Hutchinson, 43.90 miles.
8. Morris to Browns Valley, 48.60 miles.
9. Breckenridge to Crookston, 114 miles.
10. Crookston to Fosston, 46.08 miles.

11. Benson to State line, 45.92 miles.
12. Evansville to Tintah, 32.03 miles.
13. Shirley to St. Hilaire and Red Lake Falls, 40.95 miles.
14. Yarmouth to State line, 10 miles.

And has also acquired, completed and put into operation, as particularly set forth in said stipulation, the following branches.

15. Crookston to East Grand Forks, 23.5 miles.
16. Barnesville to Moorhead, 22.79 miles.

Save as herein found the allegations in the pleadings are not sustained by the evidence and are found not true.

From the foregoing facts, the Court finds as conclusions of law, that plaintiff is entitled to judgment against the Great Northern Railway Company in an amount equal to one per cent of the gross earnings for the year 1905, of the several branches above described, and all of them.

Let judgment be entered accordingly.

A stay of forty days is granted.

July 10, 1908.

OLIN B. LEWIS,
District Judge.

Filed July 11, 1908.

647 *Memorandum.*

The State of Minnesota brings this action to collect from the Great Northern Railway Company a four per cent. gross earnings tax for the year 1905 upon its Manitoba lines. The company, prior to the commencement of this action, voluntarily paid three per cent on its gross earnings as a tax for that year upon the lines in question.

The real issue arises upon the demand of the State for the payment of the additional one per cent., amounting to $120,737.38. The action is brought under Chapter 253, Laws of 1903, adopted by a majority vote of the people at general election, November, 1904, which required every railroad company owning or operating any line of railroad within or partly within the State * * * to pay into the treasury of the State an amount equal to four per cent. of the gross earnings derived from the operation of such road in lieu of all taxes and assessments upon the taxable property.

The Great Northern Company contends its property is not subject to taxation according to the law of 1903, but is excepted therefrom by virtue of an alleged charter contract made by the territorial legislature May 22, 1857, providing that the Minnesota & Pacific Railroad Company shall pay a three per cent. gross earnings tax, in lieu of all other taxes, which, by acceptance and by acts of the parties, has become a binding contract that cannot be abrogated or modified without consent of the parties, and that the law of
648 1903 is unconstitutional so far as it conflicts with this charter.

Section 18 of this charter is referred to as the irrepealable contract, and provides for a straight three per cent. tax on the gross earnings of the road in lieu of all other taxation. This is the con-

tract which defendant claims has been impaired by the four per cent. gross earnings tax law of 1903.

Some familiarity with the legislative history of the road will be helpful upon the issues presented; a cursory review of such enactments appears in Exhibit "B" attached and made a part hereof.

This law is well settled that the taxing power is essential to the existence of government and cannot be held to have been relinquished in any instance unless the deliberate purpose of the State to that effect clearly appears, and when the language admits of reasonable contention, the conclusion should be in favor of the reservation of the power.

Wilmington & Weldon R. R. Co. *v.* Alsbrook, 146 U. S. 294.

The territory became a State in 1858; Section 1, Article 9 of the Constitution provided that:

"All property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state." Section 3: "Laws shall be passed taxing * * * all joint stock companies * * * and also all real and personal property, according to its true value in money."

649 I.

The charter of the Minnesota and Pacific Railroad Company was granted by territorial enactment in 1857, *prior to the admission of the State, and the adoption of the constitution, and is not affected or control-ed by these provisions in the constitution against special forms of taxation.*

The rights, immunities, lands and property acquired under a grant prior to the adoption of the Constitution are not within or controlled by the provisions therein relating to the taxing power and the mode of its exercise.

St. Paul *v.* St. Paul & Sioux City R. R. Co., 23 Minn. 469.
First Div. St. Paul & Pacific R. R. Co. *v.* Parcher, 14 Minn. 297.

This doctrine has been reaffirmed in

State *v.* Winona & St. Peter Ry. Co., 21 Minn. 315.
County of Stevens *v.* Manitoba Co., 36 Minn. 467-470.

650 II.

The original charter of the Minnesota & Pacific Railroad Company, providing for the payment of a gross earning tax in lieu of all other taxation of its property, constitutes a valid, irrepealable contract between the State and the company.

The granting of the charter by the territorial legislature to the Minnesota & Pacific Railroad Company, containing this immunity from taxation was accompanied by all the essential- of a contract, namely a consideration, which involved a counter-obligation in the nature of a service or detriment.

In the case of Wall *v.* Home of the Friendless, 8 Wall. U. S. 430, the Court says. "There is no necessity of looking for the considera-

tion of a legislative contract outside the objects for which the corporation was completed. Benefit constitutes the consideration for the contract and no other is required to support it."

The distinction between a general law relating to taxation, and a special charter like that in this case which called for and received an acceptance, must be kept in mind in considering the character of this contract. This charter exemption has been held to be a vested contract right between the State and the company in respect
651 to taxation, which the State alone has not the power to impair.

St. Paul *v.* St. Paul & Sioux City Ry. Co., 23 Minn. 469.
State *v.* Winona & St. Peter Ry. Co., 21 Minn. 315.
County of Stevens *v.* Manitoba Co., 36 Minn. 467, and cases cited on page 470:
Powers *v.* Railway, 201 U. S. 543.
First Division St. Paul & Pac. R. R. Co. *v.* Parcher, 14 Minn 224.

"It is a right and a contract right" declares the Court in the opinion in this last case.

While the legislature has the power to bind the State in relinquishing its power to tax corporations, such a provision in a charter granted by a territorial enactment, is a contract which the succeeding state may not subsequently impair.

Humphrey *v.* Pegues, 83 U. S. 249.

The State may regulate the method and exercise of the powers conferred in a charter, as it has done in the case at bar, without repealing its provisions.

The schedule of the Constitution expressly guarded the rights under this charter of May 22, 1857, by declaring that "all rights, * * * and contract, as well of individuals as of bodies corporate, shall continue as though no change had taken place."

652 III.

The immunity from taxation in this charter in excess of 3 per cent. of the gross earnings of the road applies to the "original lines" therein described.

The main line from Stillwater to Breckenridge and the so-called branch from St. Anthony via Anoka and St. Cloud to St. Vincent, are specifically named and authorized in this charter of 1857.

The charter defines the route by way of Crow Wing to St. Vincent. The State legislature subsequently permitted the road to be located via Sauk Center, Barnesville and Crookston, which appeared to be a valid exercise of legislative power in the direction of regulating an existing authority created by the territory before it became a state. This principle is established in the case of the First Division of the St. Paul & Pacific Company *v.* Parcher, page 224. Pursuant to the original charter and in substantial compliance therewith, the terminals therein named were connected by lines completed in 1879, extending over 602.59 miles.

The authority granted to construct roads was however limited to the lines described in the charter and cannot be extended by implication against the rights of the state under the Constitution. The gross earnings tax provision is therefore restricted to the lines authorized.

Upon the facts in this case, the only lines to which this
653 three per cent. gross earnings tax is applicable are the "original lines," described in the first two paragraphs in subdivision 3 of the stipulation.

My conclusion is that the "main line," "branch" and "extension," designated for convenience, the "original lines," as finally constructed are expressly described and located in the charter, and clearly within its exemption.

IV.

This immunity from taxation in excess of 3 per cent. of the gross earnings does not apply to the branch lines built or owned by the Manitoba Company.

After the Manitoba Company has acquired title to the "original lines" so exempt from other taxation, and between June 21, 1879, and January, 1893, 16 branch lines were constructed or completed with an aggregate mileage of 753.13 miles, viz:

1. Osseo Junction to St. Cloud, 66.33 miles.
2. Elk River to Milaca, 31.80 miles.
3. East St. Cloud to Hinckley, 66.38 miles.
4. St. Cloud to Milmar, 55.70 miles.
5. Sauk Center to Park Rapids, 90.60 miles.
6. Fergus Falls to Pelican Rapids, 21.65 miles.
7. Wayzata to Hutchinson, 43.90 miles.
8. Morris to Browns Valley, 48.60 miles.
9. Breckenridge to Crookston, 107 miles.
10. Crookston to Fosston, 46.08 miles.
11. Benson to State line, 45.92 miles.

654 12. Evansville to Tintah, 32.03 miles.

13. Shirley to St. Hilaire and Red Lake Falls, 40.95 miles.
14. Yarmouth to State line, 10 miles.
15. Crookston to East Grand Forks, 23.5 miles.
16. Barnesville to Moorhead, 22.79 miles.

One to fourteen inclusive, were constructed as "branches" to the "original lines" by the Manitoba Company between January 1881 and January 1893. Branches 15 and 16 were completed in 1880 and acquired by the Manitoba Company together with the "original lines" under the foreclosure sale. The original charter did not obligate the Minnesota & Pacific Railroad Company or its successors to construct any of these 16 branches. They were built by authority of state laws, silent in themselves, upon the subject of taxation, passed subsequent to the adoption of the Constitution.

There is nothing in the language of these several acts in respect to taxation.

That these branches were not authorized by the original charter is shown by the further fact that legislative authority was deemed

a necessary pre-requisite to their construction. The original charter was not the source of the power under which these branches were built.

S. W. R. R. Co. *v.* Wright, 116 U. S. 231.

The immunity granted in the charter by the territorial legislature applied only to the "original lines."

The amending acts attempting to extend it to the branches
655 were enacted after the Constitution was adopted. This constitution declared that no property, real or personal, shall be exempt from taxation, with certain exceptions, not including railroad property. Until 1871 the Constitution prohibited such legislation, but by the amendment of that year, such enactments were validated with power in the people to amend them.

State *v.* Duluth & Iron Range Ry. Co., 79 Minn. 433.
State *v.* Stearns, 72 Minn. 200.
State *v.* Luther, 56 Minn. 156.

In 1905 the people exercised that power, and ratified the act of 1903, requiring all roads to pay a four per cent. gross earnings tax, and this amendment does not, in terms or by fair implication, contain any exemption from taxation or reservation of the power of taxation in respect to these branch lines owned by the Manitoba Company. The provisions in the Constitution prior to 1871 in respect to taxation were not applicable to charters granted by the territory of Minnesota.

The State never had the power to grant immunity from taxation, and therefore it could not extend the scope of any such system previously granted by the territory. While it is true that the State has the power to regulate an authority previously granted, it is the law that a charter right previously conferred by a territorial grant can only be amended by the state where the right of amendment is reserved in the constitution. It is the settled law that
656 immunity from taxation will not be recognized unless granted in terms too plain to be mistaken.

C. B. & K. C. Ry. Co. *v.* Guffey, 120 U. S. 575.

It is not clear that the territorial legislature of 1857 intended to extend the exemption from taxation in excess of 3 per cent. of the gross earnings given by the original charter to branch roads constructed a quarter of a century later under state laws. We cannot presume such intention—on the contrary we must infer that the state was left free to tax these branch roads in the same manner as other railroad property.

The 4 per cent. gross earnings law of 1903 adopted and ratified by the people of this state pursuant to Section 32*a* of the Constitution applies to these branches constructed and owned by the Manitoba Company, and by it leased to the defendant, The Great Northern Railway Company.

V.

The Great Northern Railway Company succeeded to all the rights and immunities of the Minnesota & Pacific Railway Company, including this exemption from taxation, in excess of 3 per cent. of its earnings on its original lines.

For many years it has been the accepted law of this state that this exemption from the ordinary form of taxation passed as an immunity from the Minnesota & Pacific Railroad Company to
657 the St. Paul & Pacific Railroad Company, and through it to the First Division of the St. Paul & Pacific Railroad Company.

St. Paul & Pacific R. R. Co. *v.* Parcher, 14 Minn. 224.
County of Stevens *v.* The Mpls. & Man. Ry. Co., 36 Minn. 467.
Minn. Central R. R. Co. *v.* Melvin, 21 Minn. 529.
City of St. Paul *v.* St Paul & Sioux City R. R. Co., 23 Minn. 469.

In the case of State *v.* St. Paul, Minneapolis & Manitoba Railway Company, 30 Minn. 311, on page 312, the Court says:

"Leasing or selling the railroad cannot affect the rights of the State. Into whose hands so ever the railroad may pass, and whoever may receive the gross earnings, the obligation to pay and the right of the State to receive the 3 per cent. on such gross earnings are unimpaired. Such earnings still furnish the measure of the obligation and right."

The St. Paul, Minneapolis & Manitoba R. R. Co., is a successor and owner of the lines of the Minnesota & Pacific R. R. Co., and succeeded to the "rights, franchises and immunities of that company, including its exemption from ordinary taxation."

County of Todd *v.* The St. P. & Pac. R. R. Co., 38 Minn. 164.

This immunity or right passes to and is binding upon any company acquiring running privileges over the lines authorized by the act.

Chicago, Mil. & St. P. Ry. Co. *v.* Phaenden, 23 Minn. 217.

658 In 1879 the Manitoba Company entered into a contract with the Great Northern Railway Company, under which the latter controls and operates the Manitoba lines. The contract of conveyance between these two companies does not constitute a sale, but is a lease.

The corporate existence of the Manitoba Company has never been dissolved. Under this contract the company receives stipulated rentals from the great Northern Railway Company; as a corporation the Manitoba Company occupies offices; transacts business; holds regular meetings of stockholders and directors; is possessed of all its charter powers, and exercises all its corporate functions.

Under this contract the Great Northern Railway Company operates the lines of the Manitoba Company and is obligated to pay annual rental therefor, and is granted the use of their system of roads

which upon expiration or cancellation of the lease reverts to the Manitoba Railway Company. The term of this lease is 999 years, beginning February 1, 1890. Under a similar contract the Great Northern Railway Company operates the Eastern Railway Company of Minnesota, which is for a term of 99 years, commencing May 1, 1902. These contracts are in fact valid leases and have been so held.

County of Traverse *v.* The Man. Ry. Co., 73 Minn. 417.
Morrison *v.* St. Paul & Nor. Pac. Ry. Co., 63 Minn. 75.

659 My conclusion is that the Great Northern Railway Company in respect to the 16 branches, with an aggregate of 753.13 miles, is subject to the general four per cent. gross earnings tax law of 1905, and that the State is entitled to recover an additional one per cent. on the gross earnings of said company from these branches; that the Great Northern Railway Company in respect to the original lines is within exemption privileges of the original charter of 1857, and not subject to the gross earnings tax law of 1903, and fully discharged its liability to the State by payment of the three per cent. tax.

LEWIS, *J.*

EXHIBIT "B."

The United States, by Act of Congress approved March 3, 1857, granted lands to the State of Minnesota to aid in the construction of certain railroads. The Territorial Assembly by Act of May 2, 1857, created the Minnesota & Pacific Railroad Company a corporation, and granted a portion of such lands to that company to promote the building of the road. This grant was accepted.

The constitutional convention was held August 29, 1857; the state constitution was adopted October 13, 1857. The state was admitted May 11, 1858.

On the 15th day of April, 1858, the Constitution of the state was amended (Sec. 10, Art. IX) to authorize the state to
660 loan its credit to certain railroads, among them the Minnesota & Pacific Railroad Company, upon certain securities and lands, and in default of payment authorized the Governor of the State to sell the securities or to foreclose the mortgage securing the same.

August 12, 1858, and Act (Ch. 72) was passed directing the Governor upon default in payment of the bonds held by the State, to indemnify the State by sale of the bonds or lands pledged, or by foreclosure of the mortgage or deed of trust, or by any or all of these means. These powers were enlarged by supplemental act November 27, 1858.

July 31st, 1858, the Minnesota & Pacific Railroad Company made a trust deed subject to the liens of the state to secure the payment of Minnesota state railroad bonds, and designated three trustees to whom it transferred in trust the entire railroad property and franchises, therein declared to be "appurtenances" thereto, to be trans-

ferred and sold therewith, and in case of default authorized the trustees, or in case of their failure the Governor of the State, to sell and transfer said property and franchises.

March 6, 1860 (Ch. 82), the Legislature declared a default on the part of the Minnesota & Pacific Railroad Company, and directed the Governor to cause the trust deed to be foreclosed and authorized him to bid the property off in the name of the State. On the 23rd of June, 1860, the Governor sold all the "rights, lands properties, privileges and franchises" which the Minnesota & Pacific Railroad Company owned, to the State.

661 The Legislature, November 8, 1861, by an act to facilitate the construction of the Minnesota & Pacific Railroad Company, released and restored, upon certain conditions, all the rights and property thus acquired to the Minnesota & Pacific Railroad Company, free of the state's liens, with a provision that in case of forfeiture the state should acquire and hold the property and franchises without merger or extinguishment.

This grant was not accepted, and March 10, 1862, the legislature declared the forfeiture accruing under the act of November 8, 1861, and transferred and invested "all the rights, privileges, franchises, lands, property and interest" of the company under the act of May 22, 1857, in Dwight Woodbury and others, upon certain conditions, free of liens of the state, and created these persons a corporation under the name of "The St. Paul & Pacific Railroad Company."

On the 6th of February, 1864, the legislature amended the charter of the St. Paul & Pacific Railroad Company, and authorized consolidation "of its main line, or any or all of its branches, also with any other railroad or companies," with right to re-locate the lines of its road and branches," so as to run the main line from St. Anthony via Minneapolis to any point between the foot of Big Stone Lake and the mouth of the Sioux Wood river, and the branch from St. Anthony to the Red River of the North, and not by way of Crow Wing; and authorized an extension of the road from some point at or above St. Cloud to the westerly end of Lake Superior, and granted

662 this line "all the rights, immunities, privileges and franchises conferred in and by its charter."

By agreement February 6, 1864, the St. Paul & Pacific Railroad Company conveyed to E. B. Litchfield as owner of certain preferred stock, all its "rights, benefits, privileges, property, franchises and interests" belonging to the line under the charter of the territory, from St. Paul to Watab, and from St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood river, with authority to form a corporation to administer that part of the road, under the style of the First Division of the St. Paul & Pacific Railroad Company.

The legislature, March 2, 1865, extended the time for the completion of the road and modified the charter in regard to taxation, by requiring the St. Paul & Pacific Railroad Company to pay during the first three years after thirty miles of the road were completed, one per cent. of its gross earnings, and during the next seven years

two per cent. of the gross earnings, and thereafter three per cent of its gross earnings, "in full of all taxation."

Two days later an act was passed requiring the lands of this Company as fast as contracted to be sold to be placed upon the proper tax lists.

On February 5, 1866, the holders of the preferred and special stock of the St. Paul & Pacific Railroad Company were created a corporation with "all the rights, benefits, privileges, property, franchises, powers and interests" of said Company belonging to
663 the road, from St. Paul to Watab, and from St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood river, under the name of the First Division of the St. Paul & Pacific Railroad Company.

On the 28th of February, 1866, the stockholders in that part of the line of the First Division of the St. Paul & Pacific Railroad Company which extends from St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood river were constituted a corporation under the name of The Great Western Railway Company of Minnesota, with "all and singular, the said rights, benefits, privileges, property, franchises, powers and interests" of the First Division Company.

The Act of March 2, 1867, authorized the St. Paul & Pacific Railroad Company, or any of its branches, to change its name, and revoked the power to consolidate with any other company.

March 4, 1868, the First Division of the St. Paul & Pacific Railroad Company was authorized to extend its line from a point in Hennepin County or Wright County through Watertown to a point on the Minnesota river (by act of March 4, 1870, designated Beaver Falls); and all provisions of the charter of said company, so far as applicable, were extended to this branch, with authority to adopt a name.

March 6, 1868, the St. Paul & Pacific Railroad Company was authorized to construct "a new branch" from near St. Cloud to the mouth of the Pigeon river via Duluth, with all the powers
664 which had been conferred by the act to facilitate the construction of the Minnesota & Pacific Railroad Company, with power to consolidate and to adopt a name.

March 6, 1869, the First Division of the St. Paul & Pacific Railroad Company was authorized to extend its line from St. Cloud via Sauk Center and Alexandria, to a point on the Red River of the North, and the charter of said company and the laws relating thereto, so far as applicable, were extended to this "branch road."

February 18, 1870, the terminus of this road was changed from a point between Big Stone lake and Sioux Wood river to the north line of Minnesota, and this branch was authorized to take a name.

The act of March 3, 1870, located the line via Sauk Center, Osakis and Alexandria, and the terminus at some point on the Red River of the North.

The act of March 5, 1870, authorized the First Division of the St. Paul & Pacific Railroad Company to construct a branch railroad from its branch line to Princeton, and extended the provisions

of the charter of said company with the law applicable thereto, to this branch, with power to adopt a new name.

October 1, 1865, the First Division of the St. Paul & Pacific Railroad Company gave a trust deed to George L. Becker and others upon the entire road from St. Paul to Watab and all lands and franchises within that limit. This was foreclosed. May 10, 1879, a certificate of sale thereunder transferred to said Barnes for
665 the benefit of Messrs. Stephens, Smith, Kittson and Hill, that part of the First Division of the St. Paul & Pacific Railroad Company, from St. Paul via St. Anthony to Watab, including "all and singular the said property, premises, rights, immunities and franchises." These grantees, on May 23, 1879, organized the St. Paul, Minneapolis & Manitoba Railway Company, and on June 1, 1879, filed Articles of Incorporation.

On July 1, 1868, the First Division of the St. Paul & Pacific Railroad Company made deed of trust to Horace Thompson, *et al.*, which was foreclosed March 24, 1879, and by sheriff's certificate June 12, of that year, that part of the road of said company known as the main line, extending from St. Anthony to Breckenridge, "together with all and singular the railways * * * also all franchises connected with or relating to the said railway * * * and all corporate franchises, including the franchise to be a corporation," * * * "appertaining to said line of railroad under or by virtue of the Congressional grants, approved March 3, 1857, and March 3rd, 1865," were sold to and acquired by the St. Paul, Minneapolis & Manitoba Railway Company.

The St. Paul & Pacific Railroad Company, April 1, 1871, gave a deed of trust to Horace Thompson and others of the road from St. Cloud to St. Vincent and from Watab to Brainerd, and "all rights, privileges and franchises" belonging thereto. This deed of trust was foreclosed, and on the 21st of June, 1879, "all and singular, the property, premises, rights, immunities and franchises" were
666 sold to the St. Paul, Minneapolis & Manitoba Railway Company.

Through these three sources the St. Paul, Minneapolis & Manitoba Railway Company, between the 10th of May and the 21st of June, 1879, acquired the so-called "main line," "the branch," and "the extension," in all 602.59 miles, and since then has built sixteen branches aggregating 760.23 miles.

On the 1st day of February, 1890, the St. Paul, Minneapolis & Manitoba Railway Company leased to the Great Northern Railway Company, for the term of 999 years, "all the several railways and lines of railway owned by it, * * * together with all the rights and franchises appertaining thereto."

The Great Northern Railway Company is a corporation existing under Chapter 160, Territorial Laws 1856, as amended, incorporating the Minneapolis & St. Louis Railroad Company, and authorized to construct a road from Minneapolis to St. Cloud and to the mouth of the St. Louis river, with power to construct branches or to become "part owner or lessee" of any railroad in the territory, and

to connect with any other road running in the same direction, and to adopt any other road of which it might make use.

Section 17 declares the charter to be a public act, subject to amendment in any manner not impairing the vested rights of the corporation.

By legislative amendment of the charter March 7, 1870,
667 the property is exempt from any taxes other than the gross earnings tax of three per cent. therein provided for.

Exhibit "A" attached to and made a part of the findings and order for judgment, is a copy of the stipulation of facts. *Supra*, pp. 30-61.

(Title of Cause.)

Stipulation Fixing Amount of Judgment.

It is hereby stipulated and agreed by and between the parties to the above entitled action that, upon the basis of the findings of fact, conclusions of law, and order for judgment herein, the amount for which the plaintiff is entitled to judgment against the defendant is thirty-two thousand two hundred eighty-five dollars and ninety-four cents ($32,285.94), this amount being one per cent. of the gross earnings, for the year 1905, of the sixteen branch lines referred to and expressly enumerated in the said findings, conclusions and order, and judgment for the said amount, together with $333.61, interest thereon from July 11, 1908, the date of the filing of the said order for judgment, and ten dollars ($10.00) statutory costs and the clerk's fees in this action, may be forthwith entered
in favor of the plaintiff and against the defendant, without
668 further notice, but reserving to both parties all rights of appeal or otherwise.

EDWARD T. YOUNG,
Attorney General,
R. A. STONE,
Attorneys for Plaintiff.
WM. R. BEGG,
Attorney for Defendant.

(Title of Cause.)

Judgment.

The above entitled action having been duly tried before and submitted to the said court at the general term, November, 1907, and thereafter and on July 11, 1908, findings of fact, conclusions of law and an order for judgment therein having been duly filed by Hon. Olin B. Lewis, one of the Judges of said court, before whom the said cause was tried, a judgment having been thereby ordered in favor of the plaintiff and against the defendant in an amount equal to one per cent. of the gross earnings for the year 1905, of the sixteen branch lines referred to and expressly enumerated in the said findings of fact, conclusions of law and order for judgment, and, by

the stipulation hereto attached, the amount for which, under the said order for judgment, the plaintiff is entitled to judgment against the defendant having been fixed and agreed upon, said amount being thirty-two thousand two hundred and eighty-five dollars and ninety-four cents ($32,285.94), together with
669 three hundred and thirty-three dollars and sixty-one cents ($333.61), interest thereon from the date of said order for judgment and ten dollars ($10.00) statutory costs and three dollars ($3.00) clerk's fees, amounting to thirty-two thousand six hundred thirty-two and 55/100 dollars.

Now, therefore, on motion of Hon. Edward T. Young, Attorney General of the State of Minnesota, and Royal A. Stone, attorneys for the plaintiff, it is hereby considered and adjudged that the plaintiff herein recover from the defendant the sum of thirty-two thousand two hundred and eighty five dollars and ninety-four cents ($32,285.94), as damages, with three hundred and thirty three dollars and sixty-one cents ($333.61), interest on said sum from July 11, 1908, the date of the filing of the order for judgment herein, to the date hereof, together with $13.00 costs and disbursements, in all amounting to thirty-two thousand six hundred thirty-two and 55/100 dollars ($32,632.55).

Witness the Hon. Olin B. Lewis, one of the Judges of said court this 12th day of September, A. D. 1908.

[SEAL.] MATT JENSEN, *Clerk*,
By G. A. JOHNSON, *Deputy*.

Approved as to form.
OLIN B. LEWIS,
District Judge.

670 (Title of Cause.)

Plaintiff's Notice of Appeal.

You will please take notice that the above named plaintiff appeals to the Supreme Court of the State of Minnesota, from the judgment of this court in the above entitled cause, entered on the 11th day of September, 1908, in favor of the plaintiff and against the defendant, for the sum of $32,632.55, in so far as it is therein and thereby adjudged and determined that the plaintiff is not entitled to have and recover of the defendant the full sum of $120,737.38, that being the amount for which judgment was demanded in the complaint herein.

Dated September 11, 1908.

EDWARD T. YOUNG,
Attorney General,
R. A. STONE,
Attorneys for Plaintiff.

To William R. Begg, Esq., attorney for the defendant and Matt Jensen, Esq., Clerk of the District Court.

Due service of the foregoing notice of appeal this 12th day of September, 1908, is hereby admitted.

WM. R. BEGG,
Attorney for Defendant.
MATT JENSEN,
Clerk of the District Court.

671 (Title of Cause.)

Defendant's Notice of Appeal.

To Hon. Edward T. Young, Attorney General, and R. A. Stone, Esquire, attorneys for said plaintiff, and to Matt Jensen, Esquire, Clerk of said District Court.

GENTLEMEN: You and each of you will please take notice that the above named defendant, Great Northern Railway Company, hereby appeals to the Supreme Court of the state of Minnesota from the judgment of said District Court in the above entitled cause, duly entered therein and docketed in the office of the clerk of said court on the 11th day of September, 1908, in favor of said plaintiff, the State of Minnesota, and against said defendant, Great Northern Railway Company, for the sum of thirty-two thousand six hundred and thirty-two and 55/100 dollars ($32,632.55) and from the whole of said judgment.

Dated September 12, 1908.

WM. R. BEGG,
Attorney for Defendant,
Great Northern Railway Company.

Due service of the foregoing notice of appeal at St. Paul this 12th day of September, 1908, is hereby admitted.

E. T. YOUNG,
Att'y Gen., and
R. A. STONE,
Attorneys for Plaintiff.
MATT JENSEN,
Clerk of said District Court.

672 15994–5.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

No-. 27-28.

STATE OF MINNESOTA, Appellant,
v.
GREAT NORTHERN RY. CO., Respondent.

STATE OF MINNESOTA, Respondent,
v.
GREAT NORTHERN RY. CO., Appellant.

Syllabus.

1. Chapter 253, General Laws 1903, approved at the general election of 1904, as provided by Sec. 32a of Art. 4 of the State Constitution, increasing the rate of the gross earnings tax of railroad companies doing business in this state to four per cent., is valid as to defendant and all its lines of road and branches thereof. The statute impairs no contractual or other vested right of defendant and is not repugnant to either the state or the federal constitution.
2. Parcher *v.* Ry. Co., 14 Minn. 297, and other similar cases, distinguished.

Reversed with directions to enter judgment for the state.

673 15994–5.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

Nos. 27–28.

STATE OF MINNESOTA, Appellant,
v.
GREAT NORTHERN RY. CO., Respondent.

STATE OF MINNESOTA, Respondent,
v.
GREAT NORTHERN RY. CO., Appellant.

Opinion.

This action involves the validity of Chapter 253, General Laws 1903, approved by the people at the general election of 1904, as provided for by Article 4, Sec. 32a, of the State Constitution, increas-

ing the gross earnings tax upon railroad companies of the state to four per cent. Though the facts and various statutes bearing upon the case, and which controls its determination, have been stated and referred to in prior opinions, a restatement is necessary to an understanding of the present opinion.

By an act approved March 3, 1857, Congress granted to the territory of Minnesota certain public lands to aid in the construction of railroads therein. (Edgerton's R. R. Laws, 82.) The act particularly defined the terms of the grant and expressly provided that the lands thereby granted were subject to the future disposal of the territory or state for the purposes therein express and no other. This when accepted created a trust which the territory or future state was bound to carry out in form and spirit as directed by the terms of the grant. For this purpose the territorial legislature, by
674 Chapter 1, Sp. Laws 1857, in effect accepted the grant and provided for the incorporation of the Minnesota and Pacific Railroad Company, and conferred upon it and its successors authority to construct and operate certain lines of railroad within the territory including specified branches, and providing for the conveyance to the company of the lands granted by Congress, substantially upon the terms and conditions imposed by the act of Congress. This act constituted the charter of the railroad company. Its organization was completed, and the company, after formally accepting the act, commenced the construction of the railroad therein provided for. Lack of capital to prosecute the work necessitated a loan by the company and it mortgaged by trust deed its line, all its property and franchise privileges to Elon Farnsworth, and others, to secure the payment of funds thus obtained. This mortgage was executed on July 31, 1858, and was supplemented by a second mortgage to the same parties in November, 1858, securing the payment of bonds issued by the company, a part of which were delivered to the state in exchange for its bonds issued under the constitutional amendment of April 15, 1858, to aid in the construction of the road. Edgerton's R. R. Laws, 3. The state bonds, to the amount of $5,000,000, though the company utterly failed to construct the road and the state in fact received no consideration therefor, the state, after a prolonged contest, by the decision of this court in State *ex rel v.* Young, 29 Minn. 474, was rightly compelled to pay.

Section 18 of the charter of the Minnesota and Pacific Company contained two distinct provisions upon the subject of taxation, in the language following:

675 (1) "In consideration of the grants, privileges and franchises herein conferred on the said Minnesota and Pacific Railroad Company, the said Company shall and will, on or before the 1st day of March in each year, pay into the territory or future state, three per centum of the gross earnings of the said railroad * * * and in consideration of such annual payments, the said Company shall be forever exempt from all assessments and taxes whatever by the territory, or state which shall succeed the territory, or by any county, city, town, village, or other municipal authority, upon all stock in said Minnesota and Pacific Railroad Company,

whether belonging to said Company or to individuals, and upon all its franchises or estate, real, personal or mixed, held by said Company;" and

(2) "that said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company, shall be exempt from all taxation till sold and conveyed by said company."

The company did not complete the construction of the lines of road provided for by its charter and made default in the payment of the Farnsworth mortgage. Whereupon, on June 3, 1860, the mortgage was duly foreclosed by advertisement in the manner and in accordance with its terms and the statutes of the state in such case made and provided, and the railway, properties, franchises, rights, and privileges of the company were purchased by the state for the sum of $1000, it being the highest and best bidder at the sale. By this purchase the state became vested with all the railroad properties, and, no redemption being made, the company became wholly divested of its rights. In March, 1861, for the purpose of
676 giving the company another opportunity to complete the roads contemplated, the state legislature by an act approved March 8, 1861, restored to the company all rights lost under the foreclosure upon the terms and conditions specified in the act, one of which was that if the company failed to construct a line of road between St. Paul and St. Anthony before January 1st, 1862, all rights under the act should be forfeited to the state without any further act or ceremony on its part. The company failed to comply with the conditions, and in consequence the land grant and all property, rights, privileges, and immunities of the company reverted to and became finally, fully, and absolutely vested in the state. Thereafter the state legislature by Chapter 20 Sp. Laws 1862, being an act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act incorporating that company, provided for the organization of the St. Paul and Pacific Railroad Company, and thereby granted to that company, and its successors, all rights, privileges, franchises, lands, and property theretofore granted to the Minnesota and Pacific Company and restored to the state by the foreclosure just referred to, and authorized it to construct the lines of road undertaken by the old company. The terms and conditions relating to the construction of the road and the conveyance of lands as the work progressed were in all respects in conformity with the act of Congress. That company accepted the act and proceeded to the performance of the obligations thereby assumed. By Chapter 3, Sp. Laws 1864, the St. Paul and Pacific Company was authorized to issue one or more classes of preferred stock and to enter into agreements or contracts with the holders thereof for the administration of the portion of the road to which the stock might pertain, and for the independent organization by such holders to enable them separately or in conjunction with the general directors of the road to exercise
677 supervision and control of their separate portion of the road. Under this act preferred stock was duly issued and the holders

thereof, acting under the statute just referred to, organized and incorporated the First Division of the St. Paul and Pacific Railroad Company, which Company, through its officers, thereafter cooperated with the St. Paul and Pacific Company in the construction of the road. The act incorporating the latter named company contained no express reference to the rate or system of taxation to be imposed upon the company, but it is claimed that all the provisions on this subject contained in the old Minnesota and Pacific company's charter passed by the terms of the act incorporating it and were included within the designation of "rights, privileges, and immunities." However, by Chapter 6, Sp. Laws 1865, an act to facilitate the completion of the St. Paul and Pacific Railroad and branches, the legislature imposed a different rate of taxation than that contained in the Minnesota and Pacific Company's charter, in this, that by this act the company was required to pay during the first three years, after thirty miles of its road had been completed, one per cent. of its gross earnings, two per cent. during the succeeding seven years, and thereafter three per cent. The act also contained a provision that the lands of the company should be subject to taxation as soon as sold, leased, or contracted to be sold or leased. The St. Paul and Pacific Company formally accepted this act, and the First Division Company thereafter complied with its terms and provisions by paying the rate of taxation thereby imposed. The organization of the Fi-st Division Company was legalized and confirmed by Chap. 1, Sp. Laws 1866. Between 1862 and 1871, both these companies separately executed trust deeds and mortgages covering the main line of the road and all its branches according to the ownership of the same by the separate companies, thereby conveying to the mortgagees or trustees all property, rights, privileges, franchises, and immunities held, owned, or possessed by either company. Both companies made default in the payment of the indebtedness secured by these instruments and they were duly foreclosed in the manner prescribed by law, John S. Barnes, for himself and associates, being the purchaser at the sale made under the foreclosure as to the branch line. Thereafter Barnes and his associates incorporated under the laws of the state the St. Paul, Minneapolis, and Manitoba Railroad Company, and to this company they conveyed all rights acquired under the foreclosure stated. Thereafter the mortgage on the main line was foreclosed and the Manitoba Company became the purchaser. By these foreclosures the Manitoba Company became the sole owner of all rights, privileges, and property of the two other companies. The Manitoba Company leased its line, together with all property rights, franchises, privileges, and immunities to the defendant Great Northern Company, incorporated under the laws of the state for the term of 999 years. The old Pacific and the First Division Companies paid taxes to the state upon the basis of the act of 1865, already referred to, viz., one per cent. for the first three years after the completion of thirty miles of road, two per cent. for the succeeding seven years, and thereafter, and until their rights passed from them by the foreclosure proceedings just referred to, at the rate of three per cent. of

678

their gross earnings. The Manitoba Company paid this rate at all times during its ownership and operation of the road. In 1871, there was duly incorporated into the Constitution of the state a provision to the effect that no statute theretofore enacted or thereafter to be enacted imposing a gross earnings tax upon the
679 railroad companies should be repealed or amended except upon a submission of the proposition to a vote of the people. Sec. 32*a*, Article 4, State Constitution. Acting under this mandate, the legislature, by the statute made the basis of this action, amended the gross earnings tax statutes theretofore enacted by raising the rate to four per cent. This applied to and made a uniform rate for all railroads of the state. (State *v.* Duluth & Northern Ry. Co., 102 Minn. 26) and was submitted to and ratified by the people, and thus became a valid enactment unless the contention of defendant presently to be mentioned be sustained.

This action was brought to recover the amount of the increased tax, the company having paid the old rate of three per cent. The defense to the action is that the charter provisions of the Minnesota and Pacific Railroad Company imposing upon it a three per cent. rate became upon acceptance by the company an irrepealable contract which passed unimpaired, as an appurtenant to the road and its franchises, by and through the various transfers of the rights and privileges of that company, to defendant, successor in interest of all prior companies. It is insisted that to enforce the statute in suit would impair the obligations of that contract and destroy and take from defendant a vested property right in violation of both the state and the federal constitutions. It appears from the record that several branches have in the past been constructed in connection with the main line of road, which were not expressly provided for by the original charter of the Minnesota and Pacific Company. As to these the trial court held the increase of the tax valid, but invalid as to the lines and branches contemplated by the original charter. Judgment was ordered accordingly, and both parties appealed.

680 We approach with some embarrassment the consideration of the questions presented owing to the expressions found in prior opinions in cases involving railroad taxation, which seem to, and which defendant's counsel earnestly insist, fully determine the questions involved in the present case adversely to the contention of the state. But in view of the fact, which will be demonstrated further along in the opinion, that the question here presented, viz., whether the provisions of the Minnesota and Pacific Company's charter on the subject of the earnings tax constituted an irrevocable contract, was not involved in any prior litigation between the state and the railroad company, and what was said in the previous cases bearing upon the question was wholly unnecessary to the decision of the particular case, and therefore not of binding force or effect, we take up and dispose of the present case as though the question were, as it is, here for the first time. Whatever doubts the previous decisions may have created are all cleard up by a close analysis of the precise issues there presented.

1. The right of a state government through its legislature, when

not restricted by constitutional provisions, by contract to limit its power of taxation is a doctrine too firmly established to admit of discussion at this time. It has been affirmed by the highest tribunal in the country, and though vigorously combatted by some able state courts, the question must be deemed for present purposes completely at rest. Oliver *v.* Ry. Co. 30 Ark. 128; Day *v.* Lawrence 167 Mass. 371; Richmond *v.* Ry. Co., 21 Gratt, (Va.) 613; Wilmington Ry. Co. *v.* Reid, 13 Wall., 264; 12 Am. & Eng. Ency. Law, 272. The contract to be irrepealable, however, must clearly and con-
681 clusively appear. The power of taxation is a sovereign prerogative; its exercise is indispensable to the maintenance of the state and its institutions, and no inferences or presumptions arising from indefinite and uncertain language that it has relinquished, limited, or abandoned the right, as to any particular person or corporation, should be indulged by the court in support of an immunity not enjoyed by all tax payers alike. Therefore the contract is strictly to be construed and must be in language and terms to clear to admit of doubt. Chicago, etc. Ry. Co. *v.* Missouri *ex rel.* Cuffy, 120 U. S. 569; State *ex rel. v.* Stearns, 72 Minn. 200; County *v.* Bell, 43 Minn. 344. The rules governing the courts in construing contracts of this kind are tersely stated in a note to Adams *v.* Yazoo Ry. Co., 60 L. R. A., at page 38:

"In construing and interpreting contracts of this class, the courts are guided by a set of principles that have now become fundamental. * * * These, in brief, are, chiefly, that taxation is the rule, and exemption the exception; the power of taxation is an essential attribute of sovereignty, necessary and vital to the very existence of the government; the whole community is interested in its maintenance unimpaired; it is presumed never to have been surrendered; and the intention to surrender it must be expressed in language so clear and free from ambiguity as to admit of no reasonable doubt. An exemption never arises by implication; it is always restricted to its lowest possible terms; every doubt must be resolved in favor of the government and against the claimant."

A long list of supporting authorities there cited discloses a uniform trend of judicial opinion on the subject.

Under the rule stated, it would seem at least doubtful whether the charter of the Minnesota and Pacific Railroad Company, in
682 so far as pertinent to the subject of gross earnings taxation, constituted an irrepealable contract between the territory and the railroad company which forever bound the territory or future state, not only respecting the method of taxation, but also the rate thereof. Two distinct provisions on the subject of taxation were embodied therein, the first providing for a gross earnings tax in lieu of all other taxes and assessments, and second an exemption of the land granted until sold or contracted to be sold by the company. The charter provided on the subject of the earnings tax that in consideration of the grants, privileges, and franchises therein conferred by the territory, the railroad company should pay annually into the treasury of the territory or future state three per centum of its gross

earnings, in lieu of all other taxes; "and in consideration of such annual payments, the said Company shall be forever exempt from all assessments and taxes whatever * * *. It is evident that a mere personal privilege was extended to the company which it might exercise or not at its option. If it failed to pay the earnings tax, the exemption ceased, and the territory could then resort to the usual method of compelling the company to contribute its share to the public burdens. The charter contains no express language indicating an intention that the company should forever submit to this form of taxation, and if it was not so obligated then, under the rule requiring mutuality in contractual obligations, the territory was not bound by that system. In other words, a fair construction of the language of the charter, within the strict rule, would seem to justify the conclusion that the parties intended the earnings system of taxation to continue so long as the company complied with the terms thereof by making the annual payments, and not as an irrevocable
683 contract binding upon both parties for all time. That the right of modification was intended to be reserved to the territory is evidenced by the subsequent legislation and conduct of defendant's predecessors. By Chapter 6, Sp. Laws 1865, the legislature modified the original charter by providing for the payment of one, two, and three per cent., instead of a uniform rate of three per cent. This act was accepted by the St. Paul and Pacific Company, and acquiesced in by the First Division Company by a compliance with its provisions. By this modification defendant's predecessors received and retained the benefit of an average annual reduction in their taxes of about forty per cent. for the period of ten years. This amounted to a practical construction of the contract, so far as involving the right of the state to change the rate, and if the old companies were here contesting the validity of the present statute, increasing the rate, their denial of the power of the state to so act would come at least with little or no force. While their acquiescence in the prior change would perhaps not be conclusive against them, it furnishes strong evidence that the old charter was not regarded at the time as irrepealable. Defendant, their successor, is in no better position. The right of modification is further evidenced by the amendment to the Constitution in 1871, by which it was provided that the system of gross earnings taxation as to railroad companies should not thereafter be changed except by a statute submitted to and approved by the electors.

We are of course not to be understood as intimating an opinion that a contract of the tenor and effect of the one claimed could not legally have been entered into by the territory, or that the conduct of the state in subsequently acting thereon and receiving from
684 the railroad company payment of taxes under the method then adopted was so utterly void as to justify the company in reclaiming the money paid when in consideration of its payment it avoided the property tax, or justify the state in retaining the money and also imposing a property tax. So far as performed or executed by the parties, by the payment and acceptance of the tax, the con-

tract was undoubtedly binding. 29 Am. & Eng. Law 828. But it is unthinkable that the territorial legislature intended forever, until "domesday and beyond," thus to preclude the state from applying to this company the same rule that the exigencies of the future might require it to adopt respecting the taxation of like companies in order to secure from them their equitable and ratable share of the necessary public revenues.

2. But, passing this question, upon which we merely express doubts, and conceding for present purposes that the charter provisions constituted an express contract between the territory and the Minnesota and Pacific Company, and that as to that company it was irrepealable, was it personal to the company, or did it become attached as an appurtenant to the charter, rights, franchises, and privileges of the company and pass down the line to defendant? We are of opinion that the question should be answered in the negative.

As a general rule, an exemption from taxation or the right to a particular form or method of taxation conferred by law upon a corporation is a personal privilege and inalienable by the grantee to another without express legislative authority. The law on the subject is clearly summed up in the case of Morgan *v.* La., 93 U. S. 217, where in the course of a discussion of the subject the court said:

"Much confusion of thought has arisen in this case and in
685 similar cases from attaching a vague and undefined meaning to the term 'franchise.' It is often used as synonymous with rights, privileges and immunities though of a personal and temporary character; so that if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the Company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights and privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the Company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the Company; the latter is personal and incapable of transfer without express statutory direction." See, also, authorities cited in 60 L. R. A. 1; and 35 Am. St. R. 390.

We have no statute in this state, nor did any exist in territorial days, authorizing, directly or indirectly, the mortgaging, sale, or other transfer of an exemption of this sort. The charter of the Minnesota and Pacific Company contained no such provisions, nor any language which, by implication, would justify the conclusion that a sale, mortgaging, or other transfer of the privilege was authorized or even contemplated. The exemption does not pass as an appurtenant to railroad properties, and is not included within the expression "rights, privileges, and immunities." Gulf, etc., Ry. Co. *v.* Hewes,

183 U. S. 66; C. & O. Ry. Co. *v.* Miller, 114 U. S. 176; Lake
686 *v.* Drummond, 49 S. E. 506; Rochester *v.* Ry. Co., 182 N. Y.
99; Covington Turnpike Co. *v.* Sandford, 164, U. S. 578. A distinction must not be overlooked when considering the assignability of a tax exemption between those imposing a commuted system in lieu of property taxes, and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land is granted to a railroad company to aid in the construction of a railroad company is specifically exempted from taxation until sold by the company, and the company accepts in consideration of the exemption, the exemption attaches to and follows the land. New Jersey *v.* Wilson, 7 Cranch. (U. S.) 164; State *v.* Hicks, 30 Am. Dec. 423; Ry. Co. *v.* State, 75 Tex. 356. In such case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it.

It is an elementary rule of uniform application that rights or things in action which do not survive to an executor or administrator are not assignable. An exemption from taxation comes within the rule. And though such a right or immunity might be made assignable by the express terms of the grant creating it, the language of the grant under consideration does not, either expressly or impliedly, provide therefor. The exemption was by the terms of the charter extended to the Minnesota and Pacific Railroad Company, and not to it "and its successors and assigns." City of Rochester *v.* Ry. Co., 182 N. Y. 99. Nor is an exemption a property right, or in any proper view analogous to the grant of the right to construct and oper-
687 ate a railroad or to lay gas or water mains in a public street. Such franchises may be classified as property or property rights and are transferable without express authority from the granting power. Speaking upon this subject the Court of Appeals of New York, in the case last cited, said:

"We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions in restriction of the right of the state to tax the property or to regulate the affairs of the corporations do not pass to new corporations succeeding by consolidation or by purchase under foreclosure to the property and ordinary franchise of the first grantee. * * * This we have stated to be a statutory rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris*. That privilege is not at all similar to such franchises as the right to construct and operate a railroad, to lay gas mains and supply gas, and to maintain a ferry. These franchises, when granted, become property similar in their general attributes to other property. The grant for such a franchise, even without consideration, is, unless a right to revoke is reserved, as effectual to

vest an indefeasible title in the grantee as a voluntary conveyance of a piece of land. Not so, however, as to an exemption from taxation or from the exercise of the police power. It is property only granted on a consideration, and if granted without consideration, may be recalled. Doubtless such exemptions, if attached to property
itself, would increase its value; but because they are against
688 common right they will be construed to be personal, and
limited to the grantee, unless a contrary intention clearly appears."

See, also, Memphis Ry. Co. *v.* Commissioners, 102 U. S. 609; Gulf Ry. Co. *v.* Hughes, 183 U. S. 66; Memphis *v.* Ins. Co., 91 Tenn. 566; Home Ins. Co. *v.* Tenn., 161 U. S. 198; Ry. Co. *v.* Comm., 97 Ky. 162; Ry. Co. *v.* Barry, 44 Ark. 17; an extended note in 35 Am. St. R. 390; 12 Am. & Eng. Ency. Law, 298, and cases cited.

3. But there is still another and stronger reason why an irrevocable contract right did not pass to the companies succeeding to the rights of the Minnesota Company. The contract, whatever may be its interpretation as between the territory and the original company, was entered into in 1857. Thereafter, in May, 1858, the territory was admitted to the union as a state. The foreclosure of the Minnesota and Pacific mortgage, from and through which the alleged immunity came, if at all, to defendant, occurred after the state was so admitted. Without stopping to consider the question whether there was a complete merger of the territorial exemption when the state became the purchaser and owner of the property, rights, and privileges of the company at the foreclosure sale, in so far as that exemption related to the earnings tax, treating it, as we must, independently of the land grant exemption, the further question whether the state could then grant a special privilege of this kind is answered in the negative by the positive terms of the Constitution on the subject of taxation. The Constitution then expressly provided, (Sec. 1, Article 9,) that "all taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied
shall have a cash valuation, and be equalized and uniform
689 throughout the state." The following section specifically limited the right of exemption and did not include exemptions of the character here involved nor authorize an earnings tax in lieu of all other taxes. This clearly precluded the state legislature from providing this form of taxation, by the revival of an old grant or otherwise, or from extending to any person or corporation an exemption from general taxation in consideration of the payment of an earnings tax. Nor could it create a corporation with the right to receive or hold a special privilege of this sort. This would seem too clear under the authorities to admit of serious argument. It is supported, not only on principle, but by courts of high standing. Trask *v.* McGuire, 85 U. S. 391. In that case the court in the course of the opinion said:

"The act under which the sale was made provided that the purchasers of the road should have all the rights, franchises, privileges and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limita-

tions and conditions therein contained, and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company originally possessed, if it were competent for the legislature at the time, under the new Constitution, to confer this privilege. The question, therefore, is whether the legislature was competent to grant the immunity claimed under that Constitution, which went into operation on the 4th of July, 1865, previous to the passage of any of the Acts authorizing the proceedings under which the new company acquired its rights. * * * The inhibition of the Constitution applies in all its force against the renewal of an exemption equally as against
690 its original creation; and this inhibition the legislature could not disregard in providing for the sale of the property which it had purchased."

In Keokuk Ry. Co. *v.* Mo., 152 U. S., 301, the court in the following language reiterated the same doctrine:

"But the decisive answer to this objection is that the Legislature had no power, in 1869, to extend to a new corporation created by the consolidation, an exemption contained in an act passed in 1857, before the constitution was adopted, and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

It was reaffirmed in Rochester Ry. Co. *v.* Rochester, 205 U. S. 236, and again in Yazoo Ry. Co. *v.* Vicksburg, 209 U. S. 358.

We are speaking now of the earnings system of taxation inaugurated by the Minnesota and Pacific charter, and not with reference to the specific exemption of the land grant. For, as already pointed out, the provisions of the charter on the subject of the earnings tax and those in reference to the land grant exemption are separate and independent. As to the latter, the exemption being as to specific property delivered to the railroad company for a special purpose which would have been practically valueless without the exemption, (County of Nobles *v.* Ry. Co., 26 Minn. 294,) and received by the com-
691 pany in consideration in part at least, of the exemption, was an exemption of the land and not of the corporation. It follows, therefore, that an irrevocable right to the gross earnings system of taxation at an unchangeable rate did not pass from the state when it conferred upon the immediate successors of the original company all "the property, rights, privileges, franchises and immunities" of that company, which it acquired on the foreclosure. Nor was one created by the acts of the state legislature in 1865, by which the original charter provisions on the subject were modified. Chaps. 6 and 9, Sp. Laws 1865. The legislature of the state was prohibited

by the express mandate of the Constitution from granting such an immunity. All statutes therefore by which an attempt was made to confer the immunity upon defendant's predecessors in interest were unconstitutional and void. State *ex rel. v.* Stearns, 72 Minn. 200.

4. There is, however, another feature of the controversy which fully sustains the right of the state to increase the gross earnings tax. About the year 1869 an agitation was commenced on the subject of railroad taxation which has since then almost continuously, in one form or another, been either before the legislature or the courts of the state. This did not, until the act under consideration was passed, involve the gross earnings system or the rate thereof, but was directed to efforts to separate the land grant of this and other land grant roads for the purposes of taxation in addition to the earnings tax. This we held in the Parcher case, *supra,* and other subsequent cases, could not be done. But the earlier agitation led to the amendment of the Constitution in 1871, by which Sec. 32a of Article 4 was added to that instrument. That amendment, as held in the Stearns case, *supra,* in effect validated prior legislation inaugurating this form of taxation as to railroad companies,
692 and all acts conferring the privilege to so discharge their obligations in respect to taxation. But coupled therewith was the reserved right on the part of the state to repeal or amend the same, provided the proposed amendment be ratified by the electors. Upon that amendment to the Constitution then, the validity of which has never been challenged, rests the inauguration of a valid earnings system of railroad taxation in this state; but no irrevocable contract right was thereby granted or became vested in the railroad companies. The power to amend, within reasonable limitations, still remained in the state, under which the act under consideration is valid. It simply increased the rate from three to four per cent., and no claim is made that, if the power of amendment exists, as compared with the rate imposed upon other taxpayers, it is unreasonable or unfair to the railroad companies. This power of amendment was expressly recognized and affirmed by the Supreme Court of the United States on a review of the case of State *ex rel. v.* Stearns, *supra.* (Stearns *v.* State, 179 U. S. 223.) Mr. Justice Brewer, speaking for the court with reference to this amendment to our Constitution, said:

"Confessedly after that amendment there existed a binding contract between the state and the railroad companies, by which the taxes on all their property were to be commuted and discharged on the payment of three per cent. of the gross earnings. If nothing had since occurred, that contract, under the decision of the Supreme Court, would continue exempting lands not used, as well as lands used for railroad purposes, from any other taxation than that which was expressed by three per cent. on the gross earnings of the companies. In other words, so far as the railroad companies are concerned, that constitutional amendment did away with
693 the restrictive features of Sections 1 and 3 of Article 9 in the state constitution, and permitted and endorsed a peculiar method of taxation of railroad companies. The constitutional

amendment of 1871 forbade any change by repeal or amendment of laws respecting the taxation of railroad companies except upon a vote of the people. The converse of that proposition may be accepted, to wit, that by a vote of the people the tax provision concerning railroads might be repealed or amended. But is there no limitation upon the power of amendment?"

The court then proceeded to hold that an amendment which attempted to separate the land grant for the purposes of ordinary taxation, still retaining and enforcing the earnings rate in full, was unreasonable, saying that

"a contractual exemption of the property of the railroad company in whole, upon consideration of a certain payment, cannot be changed by the state so as to continue the obligation in full, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract."

The argument of counsel for defendant that the purpose and object of this amendment to the Constitution was to prevent any decrease in the rate or any change in the method without the consent of the people is not sound. Nor is there anything in the opinion in State *v.* Luther, 56 Minn. 156, to sustain that view. On the contrary, the court by the supplemental opinion refrained from expressing any opinion upon the question whether the power of amendment remained in the state.

If our views upon this branch of the case are sound, and of their correctness we are firmly convinced, it follows that the statute increasing the earnings tax to four per cent. is valid as to all lines owned and operated by defendant, whether authorized or
694 contemplated by the old Minnesota and Pacific charter, or by subsequent legislation. We so hold.

5. But it is urged that the conclusions here announced are in conflict with prior adjudications of this court, upon which reliance is had to sustain the claim that an irrevocable contract for a three per cent. rate was created by the Minnesota and Pacific charter which passed to and became vested in defendant. Attention is called in support of this contention to Ry. Co. *v.* Parcher, 14 Minn. 297; State *v.* Ry. Co., 32 Minn. 294; County of Stevens *v.* Ry. Co., 36 Minn. 467; County of Traverse *v.* Ry. Co., 73 Minn. 417; State *v.* Luther, 56 Minn. 156; Ry. Co. *v.* Pfaender, 23 Minn. 217; State *v.* Ry. Co., 30 Minn. 311; County of Todd *v.* Ry. Co., 38 Minn. 163, and other similar cases. But an examination of each demonstrates that the question here presented was in no way involved. The Parcher case involved the right of the state to tax the land grant in addition to enforcing the earnings tax, and while the court discussed at some length the contractual relations arising from the Minnesota and Pacific charter, it finally reached the pivotal question before it and held that the specific exemption of the land was valid, and upon that conclusion based its decision. The result of that decision is in full harmony with the view that the exemption of specific property donated to the railroad company for a specific purpose attached to the land, and was not, like the earnings system, a personal privilege to the grantee. The Pfaender case involved solely the question

whether the railroad was liable for a two or a three per cent. tax on its earnings. The case of State *v.* Ry. Co., 21 Minn. 315, again presented the taxability of the land grant, and the decision was placed squarely upon the clause of the charter of May 22, 1857,
695 which is therein quoted, that the lands granted by the state "shall be and are exempted from all taxation until the same shall have been sold and conveyed." The other cases also involved solely this specific exemption. The question whether the provisions of the charter respecting the gross earnings tax constituted an irrevocable contract was not before the court in either of the older cases and a consideration thereof was wholly unnecessary to the result reached. Such appears to have been the view of Mr. Justice White, (with whom concurred Justices Harlan, Gray and McKenna), in Stearns *v.* State, 179 U. S., supra, for he there said:

"Nor does it seem to me that the decisions of the Minnesota courts, which are referred to as showing that under the Constitution of that state it was competent for the legislature to enact a gross receipt tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. In no single one of these cases was the question of irrepealable contract presented, considered, or decided in any form."

What was said in the opinion in State *v.* Ry. Co., 21 Minn. 315, in reference to the case of Trask *v.* McGuire, *supra*, should be given no greater force or effect than the decision of a question now claimed to have been determined but which was not before the court. The taxation of the land grant was also involved in county of Nobles *v.* Ry. Co., 26 Minn. 294; County of Stevens *v.* Ry. Co., 36 Minn. 467; County of Todd *v.* Ry. Co., 38 Minn. 163; and in Traverse County *v.* Ry. Co., 73 Minn. 417. In the last case cited the court again took occasion to say, and correctly so, that "the question whether the legislation on the subject involves the elements of a contract between the defendant or its predecessors and the state, is not necessarily involved, and need not now be considered."

696 Yet that case, and the Luther case *were* where substantially the same statement was made, were for all practical purposes identical with the other cases referred to where the question received elaborate attention. State *v.* Ry. Co. 30 Minn. 311; State *v.* Ry. Co., 32 Minn. 294, involved only the construction of the phrase "gross earnings," and what earnings came within its meaning. Prior to the statute construed in State *ex rel v.* Stearns, *supra*, no attempt had been made by the legislature to amend or modify this system of taxation, and the act involved in the case at bar was the first attempt to increase the rate. In that case, as already pointed out, there was a legislative attempt, based on the constitutional amendment of 1871, separately to tax the lands of the company in addition to the gross earnings tax. This the Supreme Court of the United States held unreasonable.

In view of this situation it cannot be urged with any force that the earlier decisions of the court rightly adjudicated or determined the question of the power of the state to change the rate. The question not being involved in the prior cases, former expressions of the

court were *obiter* and of no binding force or effect as final adjudications. What was said therein is confessedly at variance with the conclusions of nearly all other courts, state and federal, and inasmuch as the precise question was not necessarily there before the court, we are fully justified in declining to treat them as final.

Much has been written and said on the subject of the rule of *stare decisis* and of the importance, in the interests of certainty in the law, of following and applying previous decisions in cases involving the same facts. The rule which requires this is a wholesome one and we would not minimize it in the least in the present case. It has its limitations, however, and applies only in those cases
697 where the facts and issues presented are for practical purposes the same. It does not apply to expressions of opinion upon, or even decisions of, questions not necessary to the ascertainment of the rights of the parties in the pending litigation. When the court goes beyond the precise issues and expresses views or opinions upon questions not necessarily before it, the views so expressed will be respected but cannot arbitrarily control a subsequent case where the very point is squarely presented. The reason is obvious. A question actually before the court is investigated in all its phases with deliberation and care, and though other questions may be discussed and apt principles of law declared by way of illustration, their possible bearing on future cases is seldom fully considered. 26 Am. & Eng. Ency. Law, 168, and cases cited; Cohens *v.* Virginia, 6 Wheat. 399. And in the case at bar, the validity of the land grant exemption was alone presented in nearly all the previous cases upon which defendant relies. While the court there considered and discussed the gross earnings provisions of the charter, a situation like that now before us was not investigated, considered or attempted to be determined. The language of Chancellor Kent, Page 477 of his Commentaries, is appropriate and apt in connection with this feature of the case:

"But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of report which have been overruled, doubted, or limited in their application. It is probable that the record of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without
698 reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it."

The Supreme Court of Mississippi in Adams *v.* Yazoo Ry. Co., 77 Miss. 194, a case involving a situation quite analogous to the case at bar, and where the court was confronted with prior decisions in conflict with the conclusion reached in the case then before it, said:

"We have all proper respect for the doctrine of *stare decisis*, but it

is a doctrine not inflexible, and departed from over and over by the wisest courts in proper cases. If the doctrine of *stare decisis* can be disregarded in proper cases, where the question is one merely of property rights between individuals, how much stronger is the reason for disregarding it when so to do results, as here, in restoring to a sovereign state the right to tax corporations and make them bear their just share of the burdens of that government whose protection they so constantly and persistently invoke."

See also, 26 Am. & Eng. Ency. Law, 163; Boyd *v.* Alabama, 94 U. S. 59; Cromwell *v.* County, 94 U. S. 351; Bradshaw *v.* Mill Co., 52 Minn. 59; High *v.* Shoemaker, 22 Cal. 302; Cohens *v.* Virginia, 6 Wheat, 399.

Our conclusions therefore are that defendant has no irrepealable contract on the subject of its taxation, that the statute increasing the rate of the gross earnings tax to four per cent, thus making a uniform rate as to all railroads of the state, impairs none of its
699 contractual or other vested rights, that it is valid, and the state is entitled to judgment accordingly. The judgment of the trial court is therefore reversed on the state's appeal, affirmed as to defendant's appeal, and final judgment ordered to be enterd in this court in favor of the state for the amount claimed in the complaint.

BROWN, *J.*

700 STATE OF MINNESOTA, *ss:*

Supreme Court.

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Syllabus & Opinion in the cause therein entitled, as appears from the original, remaining copy in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 30th day of January, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

701 [Endorsed:] 88,65. No. 159945. State of Minnesota, Supreme Court. State of Minnesota, Appellant-Respondent, *vs* Great Northern Ry. Co., Respondent-Appellant. Opinion and Syllabus. Filed Dec. 24th, 1908. C. A. Pidgeon, clerk. October Term A. D. 1908. Brown, J.

702 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1908.

TUESDAY MORNING, 9:30 O'CLOCK, *October 13th*, A. D. 1908.

Court convened pursuant to adjournment, all the Justices being present.

Reg. No. 15994, Cal. No. 27.

STATE OF MINNESOTA, Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY, Respondent.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision taken under advisement.

A true record.

Attest:

C. A. PIDGEON, *Clerk*.

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk*.

703 [Endorsed:] 15994. State of Minnesota, Supreme Court. Copy of Minutes of Argument. Filed Jan. 21, A. D. 1909. C. A. Pidgeon, Clerk.

704 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

No. 27.

STATE OF MINNESOTA, Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY, Respondent.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General October Term of this Court, A. D. 1908, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the Judgment of the Court below, herein ap-

pealed from, be and the same hereby is, in all things reversed, and that the Appellant above named have judgment accordingly.

Entered December 24th, A. D. 1908.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

C. A. PIDGEON, *Clerk*.

I hereby certify that the foregoing is a full and true copy of the original Order for judgement entered in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk*.

705 [Endorsed:] No. 15994. State of Minnesota, Supreme Court. Copy of Order for Judgment. Filed Jan. 21st, A. D. 1909. C. A. Pidgeon, Clerk. Entered on page —.

706 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

No. 27.

STATE OF MINNESOTA, Appellant,
v.
GREAT NORTHERN RAILWAY CO., Respondent.

Pursuant to an order of Court duly made and entered in this cause, on the 24th day of December, A. D. 1908.

It is here and hereby determined and adjudged that the Judgment of the Court below, herein appealed from, to wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey and State of Minnesota, be and the same hereby is in all things reversed and that the judgment be entered in this Court for the amount named in the complaint in said cause, to wit, One-hundred twenty thousand, seven-hundred thirty-seven dollars and thirty-eight cents, ($120,737.38.) Now therefore pursuant to said order it is determined and adjudged that State of Minnesota, Appellant above named have and recover of the Great Northern Railway Company, Respondent above named the sum of One-hundred twenty thousand, seven-hundred thirty-seven dollars and thirty-eight cents, ($120,737.38), and Five-hundred sixty-three dollars and forty-four cents, ($563.44), interest thereon from the date of said order amounting to the sum of One-hundred twenty-one thousand, three-hundred dollars and eighty-two cents, ($121,300.82.)

And it is further determined and adjudged that the State of Minnesota, Appellant above named, do have and recover of said respondent, the Great Northern Railway Company, herein the further sum and amount of Three-hundred dollars and forty-five cents, costs and disbursements in this cause in this Court all said sums amounting in

the aggregate to the sum of, One-hundred twenty-one thousand six-hundred and one dollars and twenty-seven cents, ($121,601.27), and that said appellant have execution for the enforcement thereof.

Dated and signed this 21st day of January, A. D. 1909.

By the Court.

Attest:

C. A. PIDGEON, *Clerk.*

Statement for Judgment.

Amount to be entered by order of the Court herein...	$120,737.38
Interest thereon from December 24th, 1908.....	563.44
Costs allowed by Statute.....	25.00
Clerk's Fees, for making Return.....	30.20
Printer's Fees	221.25
Clerk's Fees, Supreme Court.....	24.00
	$121,601.27

STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Court, do hereby certify that the foregoing is a true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol, in the city of St. Paul, this 21st day of January, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

707 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1908.

TUESDAY MORNING, 9:30 O'CLOCK, *October 13th, A. D.* 1908.

Court convened pursuant to adjournment. All the Justices being present.

Reg. No. 15995, Cal. No. 28.

STATE OF MINNESOTA, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

C. A. PIDGEON, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk.*

[Endorsed:] State of Minnesota, Supreme Court. Copy of minutes of argument. Filed —— —, A. D. 190-. —— ——, Clerk

708 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

No. 28.

STATE OF MINNESOTA, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General October Term of this Court, A. D. 1908, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the Judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that the Respondent above named have judgment accordingly.

Entered December 24th, A. D. 1908.

By the Court.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

C. A. PIDGEON, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk,*
By I. A. COSWELL, *Deputy.*

[Endorsed:] No. —. State of Minnesota, Supreme Court. Copy of Order for Judgment. Filed —— —, A. D. 190–. —— ——, Clerk. Entered on page —.

709 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

No. 28.

STATE OF MINNESOTA, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause, on the 24th day of December, A. D. 1908.

It is here and hereby determined and adjudged that the Judgment of the Court below, herein appealed from, to wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed.

Dated and signed this 24th day of December, A. D. 1908.

By the Court.

Attest:

C. A. PIDGEON, *Clerk.*

STATE OF MINNESOTA, *ss:*

Supreme Court.

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol, in the city of St. Paul, this 21st day of January, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

710 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, *ss:*

OFFICE OF CLERK OF THE SUPREME COURT.

I, C. A. Pidgeon, Clerk of the Supreme Court, State of Minnesota, do hereby certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record consisting of volume, 1 containing petition for writ, writ of error, citation, bond, assignments of errors and 325 pages of the trial court record, and volume 2 containing 346 pages of the trial court record, the

opinion of the Supreme Court, and the judgment roll is a full and complete transcript of the record, judgment roll and all of the proceedings had in said Supreme Court of the State of Minnesota, in the causes between the State of Minnesota, Appellant, and the Great Northern Railway Company, Respondent, and the State of Minnesota, Respondent, and the Great Northern Railway Company, Appellant, including the opinion of the said Supreme Court in said causes as appears from the original files and records.

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing are, true and correct copies of the Petition for Writ of Error with allowance of same, and order fixing and granting a bond, and of the assignments of Error in each of said causes and Petition for Reversal, and of the Bond, as the same remain on file and of record in said Supreme Court of the State of Minnesota, and also the original Writ of Error from the Supreme Court of the United States, and the original Citation issued thereon, with proof of service thereof endorsed thereon, and that the foregoing constitutes a true, full and complete Return to said Writ of Error.

In witness whereof I have hereunto set my hand and Seal of said Supreme Court of the State of Minnesota at the Capitol at St. Paul, Minnesota, this 29th day of January, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON,
Clerk of the Supreme Court, State of Minnesota.

Endorsed on cover: File No. 21,515. Minnesota supreme court. Term No. 719. Great Northern Railway Company, plaintiff in error, *vs.* The State of Minnesota. Filed February 12th, 1909. File No. 21,515.

Office Supreme Court, U. S.
FILED.
MAY 12 1909
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted] 359.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

STATE OF MINNESOTA, DEFENDANT IN ERROR.

MOTION TO ADVANCE, POINTS IN SUPPORT THEREOF, AND JOINDER IN MOTION.

GEORGE T. SIMPSON,
Attorney General of Minnesota.
GEORGE W. PETERSON,
Assistant Attorney General of Minnesota.

(21,515)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 719.

GREAT NORTHERN RAILWAY CO., PLAINTIFF IN ERROR,

vs.

STATE OF MINNESOTA, DEFENDANT IN ERROR.

MOTION TO ADVANCE.

Now comes the State of Minnesota, by George T. Simpson, Attorney General thereof, and moves the court to advance the hearing in the above-entitled action upon the docket and set the same for argument on the 2d day of November, 1909, or at such other time as shall be designated by the court.

This motion is made under and by virtue of section 7 of rule 26 of the rules of this court.

GEORGE T. SIMPSON,
Attorney General of Minnesota.
GEORGE W. PETERSON,
Assistant Attorney General of Minnesota.

Dated May 3, 1909.

SUPREME COURT OF THE UNITED STATES.

GREAT NORTHERN RAILWAY CO., *Plaintiff in Error,*

vs.

STATE OF MINNESOTA, *Defendant in Error.*

STATEMENT.

The above-entitled cause is an action by the State of Minnesota against the Great Northern Railway Company to recover the unpaid gross-earnings tax of said company for the year 1905, pursuant to the provisions of chapter 253, General Laws of Minnesota for the year 1903, which increases the rate of gross-earnings tax of railroad companies doing business in Minnesota to four per cent upon such gross earnings.

Before the passage of chapter 253, *supra*, the rate of gross-earnings tax, under the general laws of the State, of railroad companies doing business in Minnesota was three per cent.

Such rate is likewise the rate of gross-earnings tax in the charter of the predecessor in interest of the said Great Northern Railway Company, under which charter the said company claims (section 18, act of May 22, 1857).

The suit in question was to recover the additional one per cent tax upon the gross earnings of said company for the year 1905, the said company having voluntarily paid the gross-earnings tax for said year at the rate of three per cent.

Said cause was begun in the District Court of Ramsey County, Minnesota, in the year 1906, and was finally determined by the Supreme Court of the State of Minnesota on December 24, 1908, when judgment was rendered in favor of the State of Minnesota and against the Great Northern

Railway Company in the sum of $121,601.27, said sum represenfing the unpaid one per cent of the gross earnings of said company for the year 1905.

And it was then and there adjudicated by the Supreme Court of Minnesota that chapter 253, General Laws of 1903 approved at the general election of 1904, as provided by section 32 of article 4 of the State Constitution, increasing the rate of the gross-earnings tax of railroad companies doing business in this State to four per cent, is valid as to defendant and all its lines of road and branches thereof. The statute impairs no contractual or other vested right of defendant and is not repugnant to either the State or the Federal Constitution.

The Great Northern Railway Company claims an irrepealable contract right, under and by virtue of the charter to which it claims to have succeeded, to pay a three per cent gross-earnings tax.

Points in Support of the Foregoing Motion.

As bringing the motion within section 7 of rule 26 of the rules of this court, it is respectfully submitted that the following special and peculiar circumstances exist, under and by virtue of which the motion is well made and should be granted:

1. The public revenues of the State of Minnesota are affected in this, that the sum of $121,601.27, being the recovery in the instant case, is withheld from the treasury of said State.

2. The public revenues of the State of Minnesota are affected in this, that the sum of $133,115.14, being one per cent of the gross earnings of said company for the year 1906, together with the statutory penalty of five per cent thereon, and for which sum the State of Minnesota recovered judgment in the District Court of Ramsey County, Minnesota, of

date April 3, 1909, from which judgment the said company has appealed to the Supreme Court of the State of Minnesota which appeal is now pending, is withheld from the treasury of the State of Minnesota.

3. The public revenues of the State of Minnesota are affected in this, that the sum of $139,254.04, being one per cent of the gross earnings of said company for the year 1907, together with the statutory penalty of five per cent thereon, and for which sum the State of Minnesota recovered judgment in the District Court of Ramsey County, Minnesota, of date April 3, 1909, from which judgment the said company has appealed to the Supreme Court of the State of Minnesota, which appeal is now pending, is withheld from the treasury of the State of Minnesota.

4. The public revenues of the State of Minnesota are affected in this, that the sum of $131,262.71, being one per cent of the gross earnings of said company for the year 1908, together with the statutory penalty of five per cent thereon and for which sum a motion for judgment in favor of the State of Minnesota upon the pleadings is returnable before the District Court of Ramsey County, Minnesota, on May 8, 1909, which motion will be granted as a matter of course, following the decision of the Supreme Court of Minnesota aforesaid, of date December 24, 1908, is withheld from the treasury of the State of Minnesota.

5. Like sums in taxes will accrue to the State of Minnesota for the years 1909 and 1910, and be withheld from the treasury of the State of Minnesota, in case this cause is not advanced upon the docket, for in its order said cause will probably not be determined before the taxes for said years are due.

6. This motion is made concurrently with a motion to advance the cause entitled Chicago Great Western Railway

Company, plaintiff in error, against State of Minnesota, defendant in error, which last mentioned cause involves substantially the same questions as this cause. The recovery in taxes in the case of the Chicago Great Western Railway Company, decided by the Supreme Court of Minnesota, December 24, 1908, being the same date as the decision in the case of State of Minnesota against the Great Northern Railway Company, which cause followed the decision in State of Minnesota against Great Northern Railway Company, is the sum of $25,439.42, and several actions are now pending in the courts of Minnesota for the recovery of the unpaid taxes of the Chicago Great Western Railway Company for the years 1906 ($30,960.91), 1907 ($28,034.21), and 1908 ($26,102.24), said sums aggregating $85,097.33, all of which sums are withheld from the treasury of the State of Minnesota, and like sums in taxes will accrue to the State of Minnesota from said company for the years 1909 and 1910, and be withheld from the treasury of the State of Minnesota in case said cause is not advanced upon the docket, for in its order said cause will probably not be determined before the taxes for said years are due.

7. The withholding of said sums from the public revenues of Minnesota does embarrass the administration of the government of said State in this, that in the aggregate covering the years 1905, 1906, 1907, 1908, 1909, and 1910, the gross sum of, towit: $949,769.91, will be withheld from the public revenues.

The validity of said sums as taxes due the State of Minnesota depends upon the decision of this court in the cause now proposed to be advanced.

8. The importance of the advancement of this cause upon the docket, to the Great Northern Railway Company, becomes likewise self-evident, so much so that said company joins in a request that the said cause be advanced.

For the reasons stated, it is submitted that the cause should be advanced under the rule.

Respectfully,

GEORGE T. SIMPSON,
Attorney General of Minnesota.
GEORGE W. PETERSON,
Assistant Attorney General of Minnesota.

Dated May 3, 1909.

STATE OF MINNESOTA,
County of Ramsey, ss:

George W. Peterson, being first duly sworn, does depos and say that he is Assistant Attorney General of the State o Minnesota, that he has read the foregoing statement an points in support of the foregoing motion, and that the sam are true of his own knowledge, except those matters stated o information and belief, and as to these he believes them tru

GEORGE W. PETERSON.

Subscribed and sworn to before me this 3d day of Ma 1909.

[Notarial Seal, Ramsey County, Minn.]

SADIE H. YOUNG,
Notary Public, Ramsey County, Minnesota.

My commission expires February 9, 1912.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 719.

GREAT NORTHERN RAILWAY COMPANY, *Plaintiff in Error,*
vs.
STATE OF MINNESOTA, *Defendant in Error.*

NOTICE.

To Great Northern Railway Company, plaintiff in error, and W. R. Begg, general solicitor:

Please take notice that on Monday, the 17th day of May, 1909, at the opening of the court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of said court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

Dated May 3, 1909.

GEORGE T. SIMPSON,
Attorney General of Minnesota.
GEO. W. PETERSON,
Assistant Attorney General of Minnesota.

SUPREME COURT OF THE UNITED STATES.

GREAT NORTHERN RAILWAY COMPANY, *Plaintiff in Error,*

vs.

STATE OF MINNESOTA, *Defendant in Error.*

JOINDER IN MOTION.

Now comes the Great Northern Railway Company, plaintiff in error, by W. R. Begg, general solicitor, and joins in the motion of the State of Minnesota, defendant in error, to advance the said cause upon the docket, and prays that said motion be granted and that said motion may be heard in its order on May 17, 1909.

Receipt of a copy of the brief and argument to be submitted with said motion and in support thereof is hereby acknowledged.

Dated May 3, 1909.

W. R. BEGG,

General Solicitor Great Northern Railway Co.

FILED.
SEP 3 1909
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 359.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff-in-Error.

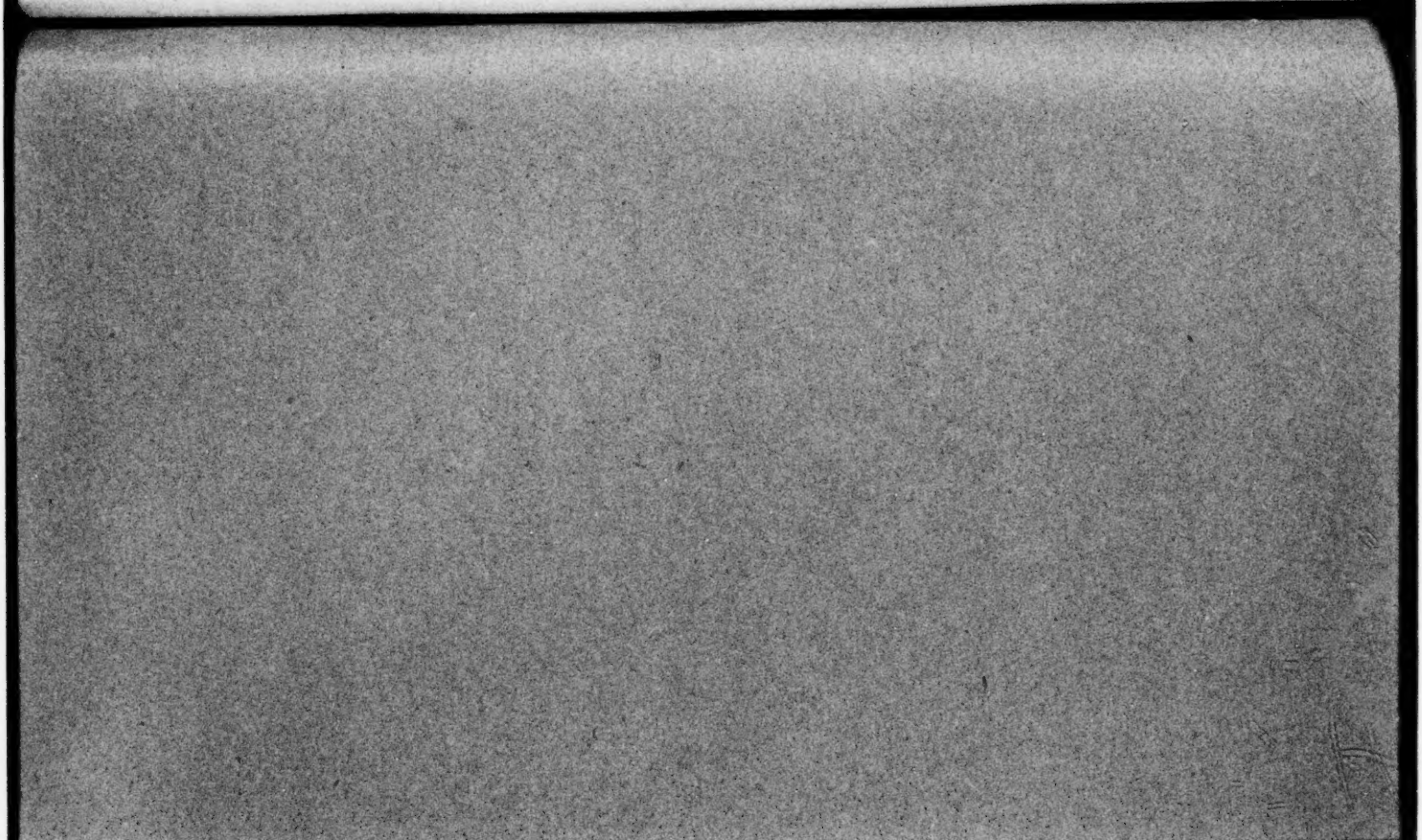
vs.

STATE OF MINNESOTA,

ON WRIT OF ERROR TO THE SUPREME COURT OF MINNESOTA.

ARGUMENT FOR PLAINTIFF-IN-ERROR.

WM. R. BEGG.



Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 359.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff-in-error.

vs.

STATE OF MINNESOTA,

On writ of error to the Supreme Court of Minnesota.

STATEMENT OF THE CASE.

This action was instituted in June, 1906, by the State against the plaintiff-in-error to recover $120,737.38 as a balance claimed to be due on account of taxes upon the gross earnings for the year 1905 of certain lines of railroad within the State of Minnesota operated by plaintiff-in-error (Trans. pp. 13, 14, 42). The lines from which the earnings are derived were the same lines, including branches

thereof, formerly owned successively by the Minnesota and Pacific Railroad Company, hereinafter called the Minnesota Company, the St. Paul and Pacific Railroad Company, hereinafter called the St. Paul Company, and the First Division of the St. Paul and Pacific Railroad Company, hereinafter called the First Division Company. The lines comprise among others, (1) a line extending from St. Paul to Breckenridge, Minnesota, 217 miles in length, hereinafter called the Main Line; (2) a line extending from a connection with the Main Line at East Minneapolis, to Sauk Rapids, Minnesota, 66.4 miles in length, hereinafter called the Branch Line; and (3) an extension of the Branch Line from East St. Cloud, via Alexandria, to St. Vincent, Minnesota, 319.19 miles in length, hereinafter called the Extension Line (Trans. pp. 29-31, 32, 346, 347).

These lines were constructed under the charter of the Minnesota Company (Trans. pp. 32, 97-109, 346). The Minnesota Company was chartered and created a corporation by an act of the legislative assembly of the Territory of Minnesota entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said state,' and granting certain lands to railroad companies therein named," approved May 22, 1857

(Trans. pp. 32, 97-109, 346). By this act the Minnesota Company and its successors in interest were authorized to construct and operate certain lines of railroad in said act named, and branches thereof. The lines specifically described in the act (sections 2 and 25) were a line from Stillwater, by way of St. Paul and St. Anthony, to the town of Breckenridge, called the main line, a line from St. Anthony, via Anoka, St. Cloud and Crow Wing to St. Vincent, near the mouth of the Pembina river, called the branch line and the extension line, a line from Winona up the Mississippi river to St. Paul, and an extension of the main line to a point on the Missouri river north of the 45th parallel of north latitude (Trans. pp. 97-109, 346).

By section 7 of the act of May 22, 1857, the Minnesota Company was authorized to construct its "railroad and branches upon and along, across, under or over any public or private highway, and to connect its railroad or branches with any other railroad or branch thereof in the territory of Minnesota or in the state of Wisconsin, and to operate the same in connection with such other road or branch under such name and on such terms as may be agreed upon, or to purchase from any other railroad company the whole or any part of any railroad or branch railroad owned by such company" (Trans. pp. 99-100). By section 13 it is authorized to acquire by condemnation right of way wherever "the line of its railroad and branches or any part thereof shall be located" (Trans. p. 101). Section 16 contains a grant to the Minnesota Com-

pany and its successors of the lands granted by the United States to aid in the construction of the road. The grant is conditioned that said lands shall be exclusively applied to the construction of that road for which it is granted (Trans. pp. 104-105). By section 21 the Minnesota Company and its successors are authorized to execute bonds and to execute and deliver mortgages upon the whole or any part of its railroad or branches to secure the payment of the bonds. The trustee in any such mortgage is empowered to take possession of the railroad or branches or any part thereof and all the corporate and other franchises and privileges pertaining thereto, and to sell the same or any part thereof and execute conveyances thereof to the purchaser (Transcript, pp. 107-108). Section 18 of the act provides:

> "In consideration of the grants, privileges and franchises herein conferred on said Minnesota and Pacific Railroad Company the said company shall and will, on or before the first day of March in each year, pay into the treasury of the territory or future state three per centum of the gross earnings of the said railroad for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever; * * * and for securing to the territory or state the payment of the aforesaid per centum it is hereby declared that the state shall have a lien upon the railroads of the said company and upon all other property, estate and effects of the said company, whether real, personal or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company. The first payment shall be made on the first day of

March next after fifty miles of said railroad shall be completed, and such payment shall be in lieu of all taxes and in full of all claims of the territory or state for the grant hereby made; and in consideration of such annual payment the said company shall be forever exempt from all assessments and taxes whatever, by the territory or state which shall succeed the territory, or by any county, city, town, village or other municipal authority in the territory or state upon all stock in the said Minnesota and Pacific Railroad Company, whether belonging to said company or to individuals and upon all its franchises or estate, real, personal or mixed, held by said company, and said land granted by said act of Congress hereby authorized to be conveyed to said Minnesota and Pacific Railroad Company shall be exempt from all taxes till sold and conveyed by said company."

(Trans. pp. 105-106).

The Minnesota Company duly accepted the act of May 22, 1857, within the time and in the manner required therein (Trans. pp. 33, 109-110, 346), and began the construction of the lines of railway in the act described (Trans. p. 33). Thereafter and on or about the 31st day of July, 1858, in order to secure state aid under Section 10 of Article IX of the state constitution adopted April 15, 1858 (App. p. 1-4), it executed and delivered to Elon Farnsworth and others, as trustees, a mortgage dated July 31, 1858, covering the main line from Stillwater via St. Paul and St. Anthony to Breckenridge, and the branch and extension lines from East Minneapolis via St. Cloud, to St. Vincent, together with all the appurtenances thereof and all the tolls, incomes, rents, issues, profits and

alienable franchises of the Minnesota Company connected with its said railroads or relating thereto, and all the equipment thereof (Trans. pp. 33, 110, 111-125, 346-347).

On the 25th of October, 1858, the Minnesota Company executed and delivered to the State of Minnesota an indenture wherein and whereby the Minnesota Company pledged to the state the net earnings and profits of its railroads in compliance with said Section 10 of Article IX of the constitution, and on the 23rd day of November, 1858, the Minnesota Company executed and delivered to the State a conveyance, free from all prior incumbrances, of the first two hundred and forty sections of land which the Minnesota Company was authorized to sell (Trans. pp. 33, 125-127, 128-133). Said conveyance was made in the form required by and was in compliance with said Section 10 of Article IX of the constitution. On the 27th of November, 1858, the Minnesota Company executed a supplement to said mortgage to Elon Farnsworth and others, which supplement was dated November 27, 1858 (Trans. pp. 33, 134-136). Of the five million dollars of bonds authorized by said Section 10, Article IX, the Minnesota Company received $600,000.00 (Trans. pp. 137, 140, 142).

The Minnesota Company failed to complete the lines of railroad and made default in the conditions of the mortgage and supplement above referred to, and thereupon the mortgage was, pursuant to statutes of the state (App. pp. 5-9) foreclosed by sale at public auction pursuant to advertisement

as in the mortgage and supplement provided (Trans. pp. 33-34, 136-144). The sale was made on the 23rd day of June, 1860, and at the foreclosure sale the State of Minnesota purchased for $1,000 the property, franchises, privileges and immunities in the mortgage described (Trans. pp. 34, 143-144, 144-147). On the 8th day of March, 1861, the legislature of the state enacted a law entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad," approved that day (Trans. pp. 34, 148-150). By this act the State restored to the Minnesota Company, upon certain conditions in the act stated, all the railroads, lands, property, rights, franchises, privileges and immunities belonging to or appertaining to the Minnesota Company prior to the foreclosure sale and purchase by the State above referred to. In section 3 of the act it was provided that in case the Minnesota Company should fail to construct and put into operation the portion of the Main Line extending from St. Paul to St. Anthony before the first day of January, 1862, all the rights and benefits conferred upon the company by virtue of the act should be forfeited to the State without any further act or ceremony, and that in case the company failed to construct the other and further portions of the road and branches at the times provided in the act the company should forfeit to the State, absolutely and without any further act or ceremony all the lands, property and franchises appertaining to the unbuilt portions of the road and branches, and that in either case, or in case of any forfeiture what-

ever under the provisions of the act the State should hold and be possessed of all such lands, property, franchises and immunities so forfeited, *without merger or extinguishment*, to be used, granted or disposed of for the purpose of aiding and facilitating the construction of said road and branches (Trans. pp. 148-149).

The Minnesota Company failed to perform the conditions in said act of March 8 1861, required to be performed by it, and the railroads, properties, franchises and immunities were forfeited to the State without merger or extinguishment (Trans. pp. 34, 150-155). The State continued to own and hold, without merger or extinguishment the said railroads, together with the franchises, privileges and immunities relating thereto, until the 10th day of March, 1862. On March 10, 1862, by an act of the legislature of the State approved that day entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad and to amend and continue the act of incorporation relating thereto," all the rights, benefits, immunities, property, franchises and interests of the Minnesota Company acquired and held by the State of Minnesota as hereinabove stated, were transferred and conveyed unto Dwight Woodbury and other persons therein named, their associates and successors, as a corporation by the name of the St. Paul and Pacific Railroad Company (Trans. pp. 34, 150-155, 347). Said corporation is the same corporation as is herein referred to as the St. Paul Company. The St.

Paul Company accepted said transfer and conveyance (Trans. p. 34).

In the year 1864, by proceedings duly had pursuant to the provisions of a public law of the State of Minnesota entitled "An act to amend the charter of the St. Paul and Pacific Railroad Company," approved February 6, 1864, the First Division Company was duly organized and became the owner of the lines of railway hereinbefore designated as the Main Line and the Branch Line, and became possessed of and entitled to use, enjoy and exercise, and did use, enjoy and exercise all the rights, benefits, privileges, property, franchises, immunities, powers and interests of the Minnesota Company and of the St. Paul Company belonging or pertaining to said Main Line and said Branch Line so far as the same had been acquired by the State of Minnesota by virtue of said purchase at said foreclosure sale under the Elon Farnsworth mortgage, and said act of March 8, 1861, and thereafter transferred and conveyed by the State to the St. Paul Company (Trans. pp. 34, 155-157, 157-165, 347).

The organization of the First Division Company and its right and title to the lines of railroad, the lands, franchises and immunities pertaining thereto, were duly confirmed in said company in and by a public act of the State of Minnesota approved February 6, 1866, entitled "An act to legalize and confirm the organization, acts and proceedings of the First Division of the St. Paul and Pacific Railroad Company and in relation to the charter

and powers of said company." The First Division Company duly accepted said act (Trans. pp. 34-35, 165-166, 348).

By the act of February 6, 1864 (Sec. 6) the St. Paul Company, the successor in interest of the Minnesota Company, was authorized to relocate its lines of road and branches so as to run and construct the Main Line from St. Anthony to any point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, and run and construct the Extension Line so as to run and construct the same from some point at or near St. Cloud to any point on the international boundary near the Red River of the North, and relieved it of the necessity of constructing its Extension Line by way of Crow Wing (Trans. p. 157).

Prior to 1864 the St. Paul Company commenced the construction of the Main Line and the Branch Line, and after 1864 the First Division Company proceeded with the construction and completion of those lines, completing the Branch Line in 1867 and the Main Line in 1871. The first thirty miles of the Branch Line was completed November 7, 1864. The St. Paul Company proceeded with the construction of the Extension Line from East St. Cloud to St. Vincent and completed that line in 1879 (Trans. p. 29).

On the second day of March, 1865, the legislature of the State of Minnesota enacted a law entitled "An act to aid and facilitate the completion of the St. Paul and Pacific Railroad and branches," which was approved that day (Ch. 6, Sp. Laws 1865).

On the 4th of March, 1865, the legislature of the state passed an act (Ch. 9, Sp. Laws 1865), entitled "An act in relation to the taxation of lands granted to the St. Paul and Pacific Railroad Company," which was approved that day (Trans. pp. 35, 166-170, 348). The act of March 2, 1865, provided:

> "That in consideration of an annual payment of a per centum as provided in this section by said corporation as aforesaid, the railroad, its appurtenances and appendages and all other property, estate and effects of said corporation which by the provisions of this act contained said corporation is to acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all taxation and from all assessments; and in consideration of the grants made to and the privileges and franchises conferred upon the company hereby created, and of the exemption contained in this section the said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year pay into the treasury of the state one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after the said railroad shall be completed and in operation; and shall during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this state on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad, and shall from and after the expiration of ten years from the completion of thirty miles of said railroad, on or before the first day of March of each and every year, pay into the

treasury of this state three per cent of the gross earnings of said railroad, and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessment whatever.

And for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this state on or before the first day of February in each year, the truth of which abstract shall be verified by affidavits of the treasurer and secretary of said company; and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstract full power is hereby vested in the Governor of this state or any other person appointed by law prescribed, to examine under oath the officers and employes of said company or other persons; and if any person so examined by the Governor or other authorized persons shall knowingly or wilfully swear falsely concerning the matter aforesaid every such person is declared to have committed perjury."

"And for securing to the state the payment of the aforesaid per centum it is hereby declared that the state shall have a lien upon the railroad of said company and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company; provided further, that the lands of said company shall be subject to taxation as soon as sold, leased or contracted to be sold or leased."

(Trans. pp. 167-168).

The act of March 4, 1865, modified the act of March 2, 1865, to the extent of making the granted lands taxable only as to the interest of the purchaser or lessee after they were leased or contract-

ed to be sold. On March 16, 1865, the St. Paul Company, in and by one and the same instrument, accepted the acts of March 2 and March 4, 1865 (Trans. pp. 35, 170).

The First Division Company accepted the act of March 4, 1865 (Trans. p. 171). The First Division Company and each of the successors in interest of the St. Paul Company and the First Division Company have always paid gross earnings taxes in accordance with section eighteen of the act of May 22, 1857, as amended by the acts of March 2 and March 4, 1865 (Trans. p. 42).

Between 1862 and 1871 the St. Paul Company and the First Division Company severally executed divers trust deeds and mortgages covering, transferring and conveying the Main Line, Branch Line and Extension Line, according to the respective ownerships of the same, each of said mortgages including, covering and conveying, among other things, all the railways, properties, rights, immunities, endowments, advantages and privileges and all corporate and other franchises connected with or related to said lines of railroad, including the franchise to be a corporation, which at the date of of such mortgages was or might thereafter be possessed or exercised by the company executing the same (Trans. pp. 35, 178-196, 185, 205-224, 213-214, 228-248, 232-233, 348-349). Among said mortgages were the following:

(1) A mortgage of said Branch Line executed by the First Division Company to George L. Becker and others, as trustees, to secure an issue of $2,-

800,000 of bonds, which mortgage was dated October 1, 1865, and under which mortgage bonds to the amount of $1,134,000 were duly issued and sold (Trans. pp. 178-196); (2) a mortgage of the Main Line executed by the First Division Company to George L. Becker and others, as trustees, to secure the payment of $6,000,000 of bonds, which mortgage was dated the first day of July, 1868, and under which bonds to the amount authorized were issued and sold (Trans. pp. 205-223); (3) a mortgage of the Extension Line from East St. Cloud to St. Vincent, executed by the St. Paul Company to Horace Thompson and others, as trustees, to secure an issue of $15,000,000 of bonds, which mortgage was dated the first day of April, 1871, and under whch bonds to the amount authorized were issued and sold as in the mortgage provided (Trans. pp. 228-248).

The St. Paul Company and the First Division Company made default in the payment of the principal and interest of the bonds issued under the mortgages above referred to, and proceedings were instituted to foreclose said mortgages (Trans. p. 348). The $2,800,000 mortgage on the Branch Line was foreclosed and a sale was had under said foreclosure on the 7th day of May, 1879 (Trans. pp. 35, 196-200). The railroads, properties, franchises and immunities covered by said mortgage were sold and conveyed to John S. Barnes and others (Trans. p. 198). Said sale was duly confirmed by the District Court of Ramsey County, Minnesota, in which the foreclosure was pending,

on the 10th day of June, 1879 (Trans. p. 35). The purchasers at said sale duly met and organized on the 23rd day of May, 1879, as The St. Paul, Minneapolis and Manitoba Railway Company, hereinafter called the Manitoba Company. The organization was effected under and pursuant to section 21 of the act of May 22, 1857, and by virtue of the corporate franchise therein created (Trans. pp. 35, 200-204). The organization was completed by executing and recording with the secretary of state a certificate in the form required by an act of the legislature of the state of Minnesota approved February 6, 1876, entitled "An act to amend Title I of Chapter 34 of the General Statutes relating to corporations."

The mortgages of the Main Line and the Extension Line were duly foreclosed, the former in a proceeding instituted in the District Court of Ramsey County, Minnesota, and the latter in a suit instituted in the United States Circuit Court for the District of Minnesota. In said foreclosure proceedings said Main Line and Extension Line were duly sold to and purchased by said Manitoba Company in the month of June, 1879 (Trans. p. 348). The respective sales under these mortgages were duly confirmed by the respective courts in which the proceedings were pending, in June, 1879 (Trans. pp. 36, 224-228, 248-250, 348).

Under and by virtue of said foreclosure proceedings and the sales thereunder, the Manitoba Company became the owner of said Main Line, Branch Line and Extension Line, and of two branch lines,

one extending from Crookston to Fisher's Landing, Minnesota, and the other extending from Breckenridge to Barnesville, Minnesota, together with all the rights, privileges, immunities and franchises pertaining to said lines, which had been theretofore granted to or possessed by the St. Paul Company and the First Division Company, the mortgagors in the mortgages hereinabove referred to (Trans. pp. 36, 196, 224, 248, 335, 348).

After said purchases the Manitoba Company extended the branch line from Crookston to Fisher's Landing so as to make its western terminus East Grand Forks, Minnesota, and built fourteen other branches (Trans. pp. 36, 335). The lines the taxes on which are involved herein are shown in red on Exhibit A (Trans. opposite p. 43).

The Minnesota Company never paid any taxes because it never finished the amount of railroad necessary to give rise to the obligation to pay taxes upon its gross earnings as provided in section eighteen of its charter (Trans. p. 36). The St. Paul Company and the First Division Company at all times after the completion on November 7, 1864, of the first thirty miles of the railroad described in the act of May 22, 1857, and prior to the acquisition of their respective lines by the Manitoba Company, paid into the treasury of the State of Minnesota taxes upon the gross earnings derived by them severally from the operation of the lines of railroad respectively owned by them as hereinabove stated as follows: Upon gross earnings derived during the first three years after November 7, 1864, at the

rate of one per centum per annum; upon gross earnings derived from the operation of said railroads for the next ensuing seven years at the rate of two per centum per annum, and upon gross earnings derived from the operation of said railroads from and after November 7, 1874, at the rate of three per centum per annum (Trans. pp. 37, 38, 42, 348). This was the rate at which gross earnings taxes were required to be paid by section 18 of the act of May 22, 1857, as amended by the act of March 2, 1865 (Trans. p. 42).

The Manitoba Company at all the times during which it operated said railway above described paid into the treasury of the state of Minnesota three per centum upon the gross earnings of said railways as required by section 18 of the act of May 22, 1857, as amended by the act of March 2, 1865 (Trans. pp. 38, 42, 349).

The Manitoba Company operated said railways until the first day of February, 1890, on which date it leased and demised the said railways, together with all the rights, privileges, franchises and immunities pertaining thereto unto the plaintiff-in-error and the plaintiff-in-error on the first day of February, 1890, entered into possession of said railways and has ever since operated the same under and pursuant to said lease (Trans. pp. 28-29, 341). In and by said lease the plaintiff-in-error covenanted and agreed to pay taxes assessed upon the gross earnings of said railroads, and the plaintiff-in-error has at all times since February 1, 1890, paid into the state treasury three per centum upon

the gross earnings of said lines of railway as required by section 18 of the act of May 22, 1857, as amended by the act of March 2, 1865 (Trans. pp. 28-29, 39, 42, 44 ff. 83).

Plaintiff-in-error is a railroad corporation created, organized and existing under and by virtue of an act of the legislative assembly of the territory of Minnesota entitled "An act to incorporate the Minneapolis and St. Cloud Railroad Company," approved March 1, 1856 (Ch. 160, Laws 1856) and acts amendatory thereof and supplemental thereto (Trans. pp. 28, 315-322, 341; State v. Great Northern Co., 100 Minn. 445, 470; Pearsall v. Great Northern Co., 161 U. S. 646, 649-650).

The lines of railway of the Manitoba Company were in 1883 extended into states westerly of Minnesota. After the extension of said lines into other states the earnings of the lines within Minnesota were computed by crediting to the lines in Minnesota the earnings on each and every item of business transacted wholly within the state of Minnesota. The earnings on items of business transacted partly over the lines in Minnesota and partly over lines in other states were apportioned between Minnesota and such other states on the basis of the mileage of said lines within each state over which each such item moved. Switching and other items were localized. This basis of division of interstate earnings was that which had been adopted and enforced by the Railroad Commission of the State of Minnesota and by the Governor of the state, and was the basis insisted upon and enforced

by all the state officers from the time that said lines were extended beyond the limits of Minnesota, and it was also the basis later established by the laws of the state (Trans. pp. 37-38).

The legislature of the State of Minnesota at its regular session in 1903, enacted a law known as Chapter 253 of the Laws of 1903, by which it was provided:

> "Sec. 1. Every railroad company owning or operating any line of railway situated within or partly within this state shall, during the year 1905 and annually thereafter, pay into the treasury of this state in lieu of all taxes and assessments upon all property within this state owned or operated for railway purposes by such company, including the equipment, appurtenances, appendages and franchises thereof, a sum of money equal to four per cent of the gross earnings derived from the operation of such line of railway within this state; and the annual payment of such sum shall be in full and in lieu of all other taxes and assessments upon the property and franchises so taxed. The lands acquired by public grants shall be and remain exempt from taxation until sold or contracted to be sold or conveyed, as provided in the respective acts whereby such grants were made or recognized.
>
> Sec. 2. The term 'gross earnings dervived from the operation of such line of railway within this state' as used in section one of this act is hereby declared and shall be construed to mean all earnings on business beginning and ending within the state and a proportion based upon the proportion of the mileage within the state to the entire mileage over which such business is done of earnings on all interstate business passing through, into or out of the state."
>
> (App. pp. 19-20.)

The gross earnings of the lines of railway hereinabove described for the year 1905, were $12,073,738.25. Of this sum the earnings of the Main Line were $5,386,016.90 and the earnings of the Branch and Extension Lines $3,459,126.96. The earnings of the sixteen branch lines in Minnesota (other than the Main, Branch and Extension Lines) aggregated the sum of $3.228,594.39 (Trans. pp. 40, 41, 342).

The plaintiff-in-error duly paid into the state treasury before the same became delinquent three per centum upon the gross earnings above stated (Trans. p. 40). This action was instituted to recover an additional one per centum upon such gross earnings (Trans. p. 42). The action was tried in the District Court of Ramsey County at the November, 1907, term of said court, and said court adjudged and decreed that the state was not entitled to recover said additional one per centum upon the earnings of the Main Line, Branch Line and Extension Line, but was entitled to recover such additional one per centum upon the gross earnings of the sixteen branch lines not specifically described in the act of May 22, 1857. Judgment was therefore entered in said District Court against the plaintiff-in-error and in favor of the State for the sum of $32,632.55 (Trans. pp. 331-342, 343).

Both the State and the plaintiff-in-error appealed from this judgment to the Supreme Court of the State of Minnesota (Trans. pp. 343, 344), which court on plaintiff-in-error's appeal affirmed and on the State's appeal reversed the judgment below and

entered judgment for an additional one per centum upon the earnings of all said lines, said judgment in the Supreme Court being for the sum of $121,601.27 (Trans. pp. 345-360, 362-363, 106 Minn. 303). To review this judgment of the Supreme Court of Minnesota a writ of error was duly sued out from this court (Trans. pp. 1-4).

Other facts appearing in the record will be referred to under the appropriate points in the brief.

The material constitutional provisions and general laws other than those printed in full in the brief are contained in an appendix.

SPECIFICATION OF ERRORS.

Said Supreme Court of the State of Minnesota erred:

1. In holding that the act of the legislative assembly of the Territory of Minnesota of May 22, 1857, as amended by the acts of the Legislature of the State of Minnesota of March 2, and March 4, 1865, did not create a valid and irrepealable contract as to the taxation of the lines of railroad provided for in said act of May 22, 1857, which had been constructed by the Minnesota and Pacific Railroad Company, the St. Paul and Pacific Railroad Company, the First Division of the St. Paul and Pacific Railroad Company and The St. Paul, Minneapolis and Manitoba Railway Company and which are operated by said Great Northern Rail-

way Company under a lease thereof (Trans. pp. 1, 11).

2. In holding that said Great Northern Railway Company did not become vested with and entitled to the benefits of said contract as to the taxation of said lines of railway described in the preceding assignment of error as an appurtenant to said lines of railway (Trans. pp. 1, 11).

3. In holding that Chapter 253 General Laws of Minnesota for the year 1903, did not impair the obligation of said contract mentioned in the first assignment of error (Trans. pp. 1, 11).

4. In holding that said Chapter 253 General Laws of Minnesota for the year 1903, did not deprive said Great Northern Railway Company of a contract right appurtenant to said lines of railway without due process of law (Trans. pp. 1, 11).

5. In holding that Chapter 253 General Laws of Minnesota for the year 1903 was valid and enforceable against said Great Northern Railway Company as applied to the lines of railway described in the first assignment of error, for the reason that said Chapter 253 as construed by the Supreme Court of the State of Minnesota impairs the obligation of the contract with reference to the taxation of said lines of railway, which contract was created by said act of May 22, 1857, as amended by said acts of March 2 and March 4, 1865, and the acceptance of said acts, in violation of Section 10 of Article I of the Constitution of the United

States; and for the further reason that said Chapter 253 as construed by said Supreme Court of the State of Minnesota deprives said Great Northern Railway Company of its property without due process of law in that it destroys and takes away from said Great Northern Railway Company without any compensation therefor a right appurtenant to said lines of railway created by said act of May 22, 1857, as amended by said acts of March 2 and March 4, 1865, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States (Trans. pp. 1-2, 11).

6. In holding that said Chapter 253 General Laws of 1903 was valid and enforceable against said Great Northern Railway Company as to the lines of railway described in the first assignment of error, for the reason that said Chapter 253 as construed by the said Supreme Court of the State of Minnesota impairs the obligation of the contract created by the several mortgages executed by the St. Paul and Pacific Railroad Company, and the First Division of the St. Paul and Pacific Railroad Company and the foreclosures of said mortgages and the purchases of the railways, properties, franchises, privileges and immunities of said companies under said foreclosure sales by The St. Paul, Minneapolis and Manitoba Railway Company, in violation of Section 10 of Article I of the Constitution of the United States (Trans. pp. 2, 11-12).

7. In holding that said Chapter 253 General Laws of Minnesota for the year 1903, was valid and

enforceable against said Great Northern Railway Company as to said lines of railway in the first assignment of error described, because said Chapter 253 as construed by said Supreme Court of the State of Minnesota impairs the obligation of the contract created by the lease executed by The St. Paul, Minneapolis and Manitoba Railway Company unto the Great Northern Railway Company dated February 1, 1890, in violation of Section 10 of Article I of the Constitution of the United States (Trans. pp. 2, 12).

8. In holding that the State of Minnesota was entitled to judgment against the Great Northern Railway Company in the sum of $121,601.27, or in any sum whatever, because of each and every of the errors hereinbefore assigned (Trans. pp. 2, 12).

ERRORS ASSIGNED IN STATE COURT.

The errors assigned by plaintiff-in-error on its appeal to the Supreme Court of Minnesota are set out in the transcript at pages 8 to 10, and raise all the questions presented by the errors assigned in this court (106 Minn. 308-316).

THE CONTENTION OF THE PLAINTIFF-IN-ERROR IS:

1. The act of May 22, 1857, and the amendatory acts of March 2 and March 4, 1865, and the acceptance of them by the Minnesota Company and its successors, created an irrepealable contract, in-

cluding a contract as to the taxation of the railroads by the act authorized.

2. Whether the franchises and immunities granted by the act of May 22, 1857, and the amendatory acts are transferable is to be determined by the local law of Minnesota as declared by the courts of that state.

3. It is so firmly established by the decisions of the Supreme Court of Minnesota as to be a rule of property, that the franchises and immunities granted by the act of May 22, 1857, and amendatory acts are transferable.

4. It is so firmly established by the decisions of the same court as to be a rule of property, that the special charter provisions as to the taxation of the railroads described in the act of May 22, 1857, as amended by later acts, create an appurtenant to the railroads which passes with the railroads to every successor in title thereto without specific enumeration in the deed or lease of the railroads.

5. The law had been by the courts of Minnesota established as stated above in paragraphs 3 and 4 long prior to the execution of the mortgages of the railroads by the St. Paul Company and the First Division Company and the foreclosure of said mortgages and the purchase of the railroads by those who organized as the Manitoba Company and the law so established entered into and became a part of the contract created by said mortgages,

their foreclosures and the purchases made thereunder.

6. The law established as above stated also entered into and became a part of the lease executed by the Manitoba Company to the plaintiff-in-error.

7. Plaintiff-in-error has by transfer from its predecessors in interest succeeded to and now possesses said irrepealable contract as to the taxation of the lines of road described in the act of May 22, 1857, and the indestructible appurtenant thereby created.

8. Said contract as to taxation and said appurtenant thereby created cover and attach to not only the Main Line, Branch Line and Extension Line, but to all the other lines involved herein.

9. Chapter 253 of the General Laws of 1903 as construed by the Supreme Court of Minnesota impairs said contract and takes away the appurtenant right thereby created, in violation of Section 10 of Article I of the Constitution of the United States, and Section 1 of Article XIV of the Amendments thereto.

ARGUMENT.

I.

THE DECISION OF THE SUPREME COURT OF MINNESOTA IN THIS CAUSE IS NOT CONTROLLING UPON THE QUESTIONS PRESENTED BY THE ASSIGNMENTS OF ERROR.

(1) WHERE THE CLAIM IS THAT A CONTRACT IS IMPAIRED BY A STATE LAW THIS COURT DETERMINES FOR ITSELF THE EXISTENCE AND SCOPE OF THE CONTRACT AND WHETHER IT IS IMPAIRED BY THE LAW AS CONSTRUED BY THE HIGHEST COURT OF THE STATE.

Bank v. Skelly, 1 Black. 436, 443.
Insurance Co. v. Debolt, 16 How. 415, 451.
Wright v. Nagle, 101 U. S. 791, 793.
Burgess v. Seligman, 107 U. S. 20, 33.
Railroad Co. v. Palmes, 109 U. S. 244, 256.
Gas Co. v. Gas Light Co., 115 U. S. 683, 692.
Railroad Co. v. Dennis, 116 U. S. 665, 667.
Railroad Co. v. Alsbrook, 146 U. S. 279, 293.
Bryan v. Board, 151 U. S. 639, 650.
Railroad Co. v. Tennessee, 153 U. S. 486, 492.
Douglas v. Kentucky, 168 U. S. 488, 502.
Stearns v. Minnesota, 179 U. S. 223, 233.
Muhlker v. Railway Co., 197 U. S. 544, 570.
Powers v. Railway Co., 201 U. S. 543, 546.

This requires an independent determination by this court of the questions: Was a valid contract created by the charter and its amendments here in-

volved? Has the contract been waived or rescinded by the parties? Is plaintiff-in-error entitled to the benefits of the contract?

(2) BUT THE LAW AS IT HAS BEEN BY THE STATE COURT DECLARED AT THE DATE WHEN THE CONTRACT WAS MADE, ENTERS INTO AND BECOMES A PART OF THE CONTRACT.

Bronson v. Kinzie, 1 How. 311, 315.
McCracken v. Hayward, 2 How. 608, 612.
Insurance Co. v. Debolt, 16 How. 415, 432.
Gelpcke v. Dubuque, 1 Wall. 175, 177.
Walker v. Whitehead, 16 Wall. 314, 317.
Edwards v. Kearzey, 96 U. S. 595, 601.
Douglas v. Pike County, 101 U. S. 677.
Railroad Co. v. Hamblen County, 102 U. S. 273,277.
Wilson v. Gaines, 103 U. S. 417, 422.
Taylor v. Ypsilanti, 105 U. S. 60, 71.
Green County v. Conness, 109 U. S. 104, 105.
Bank v. Franklin County, 128 U. S. 526.
Los Angeles v. Water Co., 177 U. S. 558.
Bradley v. Lightcap, 195 U. S. 1, 20.
Muhlker v. Railroad Co., 197 U. S. 544, 570.

The settled rules of property existing at the time a contract is made are just as much a part of that contract as are the covenants of the parties; and the law which has thus entered into the contract cannot be abrogated or changed by subsequent decisions so as to save legislation enacted after the

date of the contract from the objection that it impairs the contract.

Gelpcke v. Dubuque, supra.

Insurance Co. v. Debolt, supra.

Muhlker v. Railway Co., supra.

Hardin v. Jordan, 140 U. S. 371, 380, 384.

In *Muhlker v. Railway Co.*, the court, page 570, said:

> "We are not called upon to discuss the power or the limitations upon the power of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of the rights under it. Hence the importance of the elevated railroad cases and the doctrine they had pronounced when the plaintiff acquired his property."

The cases above cited firmly establish the principle that the law which enters into the contract is not to be determined by the latest decision of the supreme court of the state if that decision is at variance with the law as established by earlier decisions.

(3) WHERE THE SUPREME COURT OF A STATE HAS SUSTAINED THE VALIDITY OF A STATUTE FROM WHICH A CONTRACT ARISES, THIS COURT ACCEPTS THAT DECISION.

In *Powers v. Railway Co.*, 201 U. S. 543, 556, this court said:

> "It is said that we are not concluded by a decision of the supreme court of a state in reference to the matter of contract; that while the rule is to accept the construction placed by that court upon its statutes, an exception is made in the case of contracts, and that we exercise an independent judgment upon the question whether a contract was made, what its scope and terms are, and also whether there has been any law passed impairing its obligation. Douglas v. Kentucky, 168 U. S. 488. It is in order to uphold the provisions of the Federal constitution that no state shall pass a law impairing the obligation of a contract that this duty of independent judgment is cast upon this court. *But here the supreme court of the state has ruled in favor of the continued existence of a corporation and the applicability of certain statutes, and when, upon the face of such statutes, a valid contract appears, we accept the ruling that the statutes are valid and applicable enactments.* In other words the supreme court of the state having established the validity of a statute from which a contract is claimed, this court follows that decision and starts with the question, what contract is shown by statute?"

In the *Powers case* many of the questions which might otherwise have required the decision of this court had been settled by the decision of the supreme court of Michigan in *Attorney General v. Joy*, 55 Mich. 94.

II.

THE ACT OF MAY 22, 1857, AND THE ACCEPTANCE THEREOF BY THE MINNESOTA COMPANY CREATED A VALID AND IRREPEALABLE CONTRACT RELATING TO THE TAXATION OF THE RAILROADS AUTHORIZED BY THE ACT.

Home v. Rouse, 8 Wall. 430, 438.
Railroad Co. v. Reid, 13 Wall. 264.
Humphrey v. Pegues, 16 Wall. 244, 249.
Delaware Railroad Tax Case, 18 Wall. 206, 225.
Railroad Co. v. McGuire, 20 Wall. 36, 43.
Railroad Co. v. Decatur, 147 U. S. 190, 201.
Railroad Co. v. Tennessee, 153 U. S. 486.
Powers v. Railway Co., 201 U. S. 543.
First Div. Co. v. Parcher, 14 Minn. 297 (Gil. 224, 249).
Railway Co. v. Pfaender, 23 Minn. 217, 223.
St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469, 474.
County of Stevens v. Manitoba Co., 36 Minn. 467, 471.
State v. Stearns, 72 Minn. 200, 223.
County of Traverse v. Manitoba Co., 73 Minn. 417, 426.

(1) THERE WERE NO CONSTITUTIONAL RESTRICTIONS UPON THE POWER OF THE TERRITORY TO CREATE CORPORATIONS BY SPECIAL ACT AND TO MAKE VALID CONTRACTS WITH RESPECT TO TAXATION.

County of Traverse v. Manitoba Co., supra.
County of Stevens v. Manitoba Co., supra.

St. Paul v. St. Paul & S. C. R. Co., supra.
First Div. Co. v. Parcher, supra (Gil. 250).
People v. Marshall, 6 Ill. 672.

The act in question was passed by the legislative assembly of the Territory and accepted by the Minnesota Company prior to the admission of the state into the union.

(2) THE BENEFIT TO ACCRUE TO THE PUBLIC FROM THE ENTERPRISE CONTEMPLATED BY THE CHARTER IS A SUFFICIENT CONSIDERATION FOR THE CONTRACT.

Home v. Rouse, supra.
Tomlinson v. Jessup, 15 Wall. 454, 459.
Railroad Co. v. Decatur, 147 U. S. 190, 201.
Powers v. Railway Co., supra.
First Div. Co. v. Parcher, supra.
St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469, 471-472.
County of Traverse v. Manitoba Co., 73 Minn. 417, 423, 424.

In *Home v. Rouse,* supra, this court, 436, said:

"It is objected that there is no consideration stated in the act for the release from taxation, which it is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject.

There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community and this benefit constitutes the consideration for the contract, and no other is required to support it."

In *First Div. Co. v. Parcher*, the court (Gil. p. 251), said:

> "We are of opinion that a sufficient consideration is to be found in the agreement of the company to construct the road and to fulfill the other duties imposed by the charter, and among them to pay three per centum of the gross earnings of the road into the treasury of the territory or future state. Whether, in making the grant the territorial legislature acted wisely and upon a just estimate of the value of what was conferred, it is unnecessary for us to consider."

(3) THE CONTRACT CREATED BY THE ACT OF MAY 22, 1857, IS AN ENTIRE AND INSEPARABLE CONTRACT COVERING THE TAXATION OF BOTH THE RAILROADS AND THE GRANTED LANDS.

The provision as to taxation is:

> "In consideration of the grants, privileges and franchises herein conferred on the *said Minnesota and Pacific Railroad Company*, the said company *shall and will, on or before the first day of March in each year, pay into the treasury of the territory or future state three per centum of the gross earnings of the said railroad for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever;* * * * *and for securing to the territory or state the payment of the aforesaid per centum it is hereby declared that the state shall have a lien upon the railroads of the said company and upon all other property, estate and effects of the said company, whether real, personal or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company.* The first payment shall be made on the first day of March next after fifty miles of said railroad shall be completed, and

such payment shall be in lieu of all taxes and in full of all claims of the territory or state for the grant hereby made; *and in consideration of such annual payments the said company shall be forever exempt from all assessments and taxes whatever by the territory or state which shall succeed the territory, or by any county, city, town, village or other municipal authority in the territory or state upon all stock in the said Minnesota and Pacific Railroad Company, whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal or mixed, held by said company, and said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company shall be exempt from all taxation till sold and conveyed by said company.*" (Trans. pp. 105-106.)

The supreme court of Minnesota with reference to the provision (Trans. p. 350), said:

> "Under the rule stated it would seem at least doubtful whether the charter of the Minnesota and Pacific Railroad Company, in so far as pertinent to the subject of gross earnings taxation, constituted an irrepealable contract between the territory and the railroad company which forever bound the territory or future state, not only respecting the method of taxation but also the rate thereof. Two distinct provisions on the subject of taxation were embodied therein, the first providing for a gross earnings tax in lieu of all other taxes and assessments, and second, an exemption of the land granted until sold or contracted to be sold by the company. The charter provided on the subject of the earnings tax, that in consideration of the grants, privileges and franchises therein conferred by the territory the railroad company should pay annually into the treasury of the territory or future state three per centum of its gross earnings in lieu of all

other taxes 'and in consideration of such annual payment the said company shall be forever exempt from all assessments and taxes whatever.' * * * It is evident that a mere personal privilege was extended to the company, which it might exercise or not at its option. If it failed to pay the gross earnings tax the exemption ceased and the territory could then resort to the usual method of compelling the company to contribute its share to the public burdens. The charter contains no express language indicating an intention that the company should forever submit to this form of taxation, and if it was not so obligated, then, under the rule requiring mutuality in contractual obligations the territory was not bound by that system. In other words, a fair construction of the language of the charter, within the strict rule, would seem to justify the conclusion that the parties intended the earnings system of taxation to continue so long as the company complied with the terms thereof by making the annual payments, and not as an irrevocable contract binding upon both parties for all time."

The supreme court of Minnesota has in this case reached the conclusion that the provision in the act of May 22, 1857, relating to the taxation of the railroads authorized by that act, did not create a contract as to taxation of the roads, but merely extended an option which the railroad could exercise so long as it desired, and then abandon.

The language of the act which we have above quoted is most inapt to sustain the construction placed upon it by the supreme court of Minnesota. If the method of taxation of the railroads therein provided is optional with the railroad company, why is the state given a lien upon all the railroads

and upon all the other property of the company including the granted lands to secure the payment of taxes at the rate stated, and why is this lien given precedence over all other liens and judgments?

If the provision were not one binding upon and enforceable by both parties why are the railroads and property of the railroad company *in consideration of the payments forever exempt from ordinary taxation?* It cannot be that the legislature forever exempted the railroad property from ordinary taxation with the expectation that "forever" would last only so long as the railroad company might will, and that the company might at any time abandon the gross earnings tax and force the state to impose the ordinary taxes from which the company was declared forever exempt. If the Minnesota court's construction is correct, the railroad company might, when it completed fifty miles of road so as to be taxable under section 18, have exercised its option and refused to pay the gross earnings tax after having enjoyed exemption from taxes prior to the completion of fifty miles of road. To so interpret the law is to make the act of the legislature absurd.

> New Jersey v. Yard, 95 U. S. 104, 116, *infra* p. 135.

If the conclusion of the supreme court of Minnesota is correct the exemption of the granted lands from taxation was not in consideration of and conditioned upon the payment of a per centum of the gross earnings of the roads and the gross earnings tax was not and is not a tax on the granted lands.

And yet for more than forty years prior to the decision of this case the court had uniformly held that the gross earnings tax was a tax on these lands, and that the lands were exempted from other taxation only in consideration of the payment of the gross earnings tax.

County of Stevens v. Manitoba Co., 36 Minn. 467, 470.

County of Traverse v. Manitoba Co., 73 Minn. 417, 423-424 and authorities *infra*.

Chapter 253 Laws 1903, Sec. 1, is:

> "Every railroad company owning or operating any line of railway situated within, or partly within, this state, shall during the year 1905, and annually thereafter, pay into the treasury of this state in lieu of all taxes and assessments upon all property within this state owned or operated for railway purposes by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to four (4) per cent of the gross earnings derived from the operation of such line of railway within this state; and the annual payment of such sum shall be in full and in lieu of all other taxes and assessments upon the property and franchises so taxed. The lands acquired by public grant shall be and remain exempt from taxation until sold or contracted to be sold or conveyed as provided in the respective acts whereby such grants were made or recognized." (App. p. 20.)

Ch. 111 Sp. Laws 1873 (App. p. 16-18), is in similar language.

The language of these laws is the exact equivalent of the language of Sec. 18 of the act of May 22, 1857, as amended by the acts of March 2 and 4,

1865. The supreme court of Minnesota construes Ch. 253 Laws 1903, not as conferring a mere option upon railway companies, but as imposing an absolute legal obligation. Does not the same language which, when used in a statute, imposes a legal obligation, when used as a contract imposes a binding contract obligation? It is difficult to understand why a distinction should be made.

If words can ever import a definite meaning the only construction possible is that the provisions of the charter in question created a valid, irrepealable contract, binding on both parties, as to the taxation of the railroads authorized by the charter.

In *Powers v. Railway Co.*, supra, the special charter provision before the court was contained in section 9 of an act of the legislature of Michigan of 1855, and was:

> "The said company shall, on or before the first day of July, pay to the state treasurer an annual tax of one per cent on the capital stock of said company paid in, which tax shall be in lieu of all other taxes except for penalties imposed upon said company by its act of incorporation or any other law of this state. The said tax shall be estimated upon the last annual report of said corporation."

This court, p. 559, said:

> "Surely no clearer case of contract can be presented than one in which a legislature passes an act in respect to a particular corporation making special provision concerning taxation and does so with a view of inducing large expenditures by the corporation, and the completion of an unfinished road whose

> completion is deemed of great public importance, and where the special provision is as required, formally accepted, the expenditures made and the road completed."

In *Railway Co. v. Pfaender*, 23 Minn. 217, the facts were: The predecessor of the Chicago, Milwaukee & St. Paul Railway Company constructed the line from Winona to St. Paul authorized by section 25 of the act of 1857. It also constructed the extension of this line from Winona to LaCrescent authorized by section 1 of the act of March 2, 1865 (Trans. p. 167). Thirty miles of the railroad from Winona to St. Paul was completed in 1870. The balance of the road between St. Paul and Winona was completed prior to March 1, 1872, and the extension from Winona to LaCrescent was completed prior to January 1, 1873. No part of the line had ever been constructed by the Minnesota Company, the St. Paul Company or the First Division Company. The question involved was solely as to the taxation of the railroad.

The Chicago, Milwaukee and St. Paul Company claimed that this road was newly constructed, that it could be taxed for the year 1875 only at the rate of two per centum. The state brought suit for three per cent, claiming that the taxation of the road from Winona to St. Paul and the extension from Winona to La Crescent was governed by the act of May 22, 1857, as amended by the act of March 2, 1865; that the rate of taxation fixed by the act of March 2, 1865, was fixed with reference to the completion of the first thirty miles of road

built by the First Division Company and which had been completed November 7, 1864.

The court held that the railway company was obligated to pay taxes under Sec. 18 of the act of May 22, 1857, as amended by the act of March 2, 1865, though the railway company was anxious to waive its option. The court, pp. 223-224, said:

> "By the terms of the section, as amended, the exemption from assessment and taxation was granted in consideration of the annual payment of the specified per centum of gross earnings, to commence as soon as, and whenever, the requisite amount of railroad was completed and in operation; and the obligation to make this annual payment rested upon the consideration, not only of such exemption, but the grants made to and the privileges and franchises conferred upon, the company in respect to its entire road or lines of road. The obligation assumed by the state in making the grant, and that of the company in receiving it, to make the required payment in lieu and in full of all assessment and taxation, were, in a certain sense, mutual and reciprocal obligations; and it was obviously the intention of the statute that the grant of immunity from taxation should be treated and regarded as in the nature of a conditional one, charged with the perpetual burden of the annual payment therein provided, and which was to commence whenever and as soon as any portion or portions of the road to which the grant applied, amounting in all to thirty miles, should be completed and put in operation."

In *State v. Manitoba Co.*, 30 Minn. 311, the court, 313, said:

> "Into whose hands soever the railroad may pass and whoever may receive the gross earnings, the obligation to pay and the right of the

> state to receive the three per centum on such gross earnings are unimpaired. Such earnings still furnish the measure of such obligation and right."

In *State v. Northern Pac. R. Co.*, 32 Minn. 294, the facts were:

The Northern Pacific Company had leased a line from Brainerd to Watab and had acquired running rights over the line of the Manitoba Company from Watab to St. Paul. The Northern Pacific Company was a corporation organized under an act of Congress and subject to taxation in Minnesota under special laws 1870, Chapter 65, Section 1, which provided for gross earnings taxation. The Northern Pacific made earnings by reason of its use of the Manitoba line from Watab to St. Paul.

The court held that not only was the Manitoba Company obligated by its contract to pay gross earnings taxes but that any company which acquired any interest in the line of railroad was also subject to the obligations imposed by the act of May 22, 1857, as amended by the act of March 2, 1865.

In *State v. Northern Pac. R. Co.*, 36 Minn. 207, the facts were these:

By section 2 of an act of the legislature of the state of Minnesota entitled "An act to authorize the St. Paul and Pacific Railroad Company to construct a branch road to Lake Superior," approved March 6, 1863 (Spec. Laws Minn. 1863, Ch. 3, p. 147), it was provided:

> "That the St. Paul and Pacific Railroad

> Company is hereby authorized and empowered to survey, locate, construct, maintain and operate * * * a new branch railroad, having its southwestern terminus at or above some point opposite the town of St. Cloud, upon the existing branch line of said the St. Paul and Pacific Railroad, and extending from thence in a northeasterly direction by such route as they may select to the navigable waters of Lake Superior at or near the mouth of Pigeon river, by way of Duluth."

By section 5 the act was declared to be a public act.

The St. Paul Company and its successors failed to build the line and its rights were forfeited and acquired by the Western Railroad Company, and that company, prior to May 1, 1878, constructed that part of the line extending from Watab to a connection with the Northern Pacific Railroad at Brainerd, and leased the line to the Northern Pacific Company (36 Minn. 208). About July, 1884, the Western Railroad Company (then by change of name the St. Paul and Northern Pacific Railway Company) completed a line from Watab to Minneapolis and leased the line to the Northern Pacific Company. On September 18, 1884, the St. Paul and Northern Pacific Company accepted the terms of Ch. 111, Sp. Laws 1873, relating to the taxation of railroads (36 Minn. 210). The controversy was as to what law governed the taxation of these two lines of railroad and fixed the rate thereof. If the line from Watab to Brainerd was taxable under the act of May 22, 1857, as amended by the act of March 2, 1865, the rate of taxation

was three per cent; if taxable under the later law the rate was one per cent. The only question involved was the tax on the railroad. The court, p. 209, said:

> "If this line of road had been constructed and operated by the St. Paul and Pacific Railroad Company or by any company deriving from that corporation and under the peculiar provisions of its charter a separate corporate existence, there can be no doubt that pursuant to the provisions of the act of 1865 it would have been required to pay three per cent of its gross earnings for the year 1885. After the construction and putting in operation of thirty miles of road composing any part of the entire line or system of the St. Paul and Pacific Railroad Company the rate per centum prescribed by the act of 1865 became at once applicable to the entire system, so far, at least, as the same was constructed and operated by that company or by any corporation deriving its existence from it. This was decided in Chicago, Mil. & St. Paul Ry. Co. v. Pfaender, 23 Minn. 217."
>
> "The rights and obligations of the Western Railroad Company in respect to this line were such as were conferred and imposed by the act of 1877. When that act was passed the time had already become fixed by the construction of thirty miles of the St. Paul and Pacific road from which the percentage prescribed by the act of 1865 was to be computed, and the state had become entitled to receive, and the St. Paul and Pacific Company had become obligated to pay the percentage so determined of the earnings, not only of so much of the whole road or system as had then been constructed, but also of what might thereafter be constructed under the charter of that company. The obligation of the corporation towards the state on the one hand, and on the other the franchises, grants and privileges which the cor-

> poration had received and enjoyed from the state were parts of an entire plan embodied in the charter and legislation above referred to. The grant was subject to the prescribed obligation. The one was a consideration for the other."

Again, on p. 211, the court said:

> "Whether in fact the Western Railroad Company was or was not subject to the general tax law of the state in 1877 does not appear, but that is not important for the purpose of construing this act so as to arrive at the intention of the legislature."

It was held that the line from Watab to Minneapolis was taxable under Ch. 111, Sp. Laws 1873, at the rate of one per cent only.

In *County of Traverse v. Manitoba Company*, 73 Minn. 417, the court, p. 424, said:

> "The decisions of this court from the Parcher case down have all been to the effect that this exemption from ordinary taxation was not simply a personal privilege conferred upon the original company, but was appurtenant to the line of road and existed in favor of any company which in consideration of the land grant should assume the construction and maintenance of the line by which it was applicable; that the immunity as well as the burden passed to any company which acquired the road and assumed its operation and the performance of all other duties which the original company owed to the public."

The court, after citing a large number of its own decisions on the subject, proceeds, p. 425:

> "In some of these cases the point decided was that any company owning and operating the road was liable to pay the three per cent

> gross earnings tax; *but the converse of this must be true, inasmuch as this is a tax on the granted lands* (until sold) *as well as on the railroads; and if the burden is appurtenant to the road so must be the reciprocal benefit, the two being parts of a unit.*"

In *State v. Luther*, 56 Minn. 156, 162, the court said:

> "There is nothing in the suggestion that such laws may be held valid as to the taxation of property devoted to railroad purposes but void as to the taxation of the granted lands.
>
> The provisions of the laws as to taxation must be all valid or all void and for two reasons: first, the percentage of the gross earnings of the road is a tax on both the road and the lands and not the road alone, and second, the vice, if there be one, in the commuted system of taxation, would apply to the one class of property as well as the other."

See also County of Todd v. Manitoba Co., 38 Minn. 163, 164.

County of Hennepin v. Manitoba Co., 33 Minn. 534, 535.

First Div. Co. v. St. Paul, 21 Minn. 526.

In *Stearns v. Minnesota*, 179 U. S. 223 (s. c. 72 Minn. 200), there was involved the act of February 23, 1865 (Sp. Laws 1865, Ch. 2, p. 19), and the act of March 4, 1870 (Sp. Laws 1870, p. 338), providing for the taxation on gross earnings basis of the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company. The terms of these acts are practically identical with the terms of section 18 of the act of May 22, 1857. The whole discussion of these acts by this court went on the theory that the contract

was an entire and inseparable contract covering the taxation of both the railroads and the lands, and not two separate contracts, one relating to the taxation of the railroads, which was repealable, and the other relating to the taxation of the lands, which was irrepealable.

(4) THE STATE MAY, UNDER THE POWER OF EMINENT DOMAIN, TAKE FROM PLAINTIFF-IN-ERROR THE BENEFIT OF THE CONTRACT UPON MAKING COMPENSATION THEREFOR.

Bridge Co. v. Dix, 6 How. 507, 534.

Gas Light Co. v. Light & Heat Co., 115 U. S. 650, 673.

The supreme court of Minnesota (Trans. p. 352), said:

> "But it is unthinkable that the territorial legislature intended forever, until 'domesday and beyond' thus to preclude the state from applying to this company the same rule that exigencies of the future might require it to adopt respecting the taxation of like companies in order to secure from them their equitable and ratable share of the necessary public revenues."

To be sure the state must raise its necessary revenues from taxation. It may be extremely desirable that all persons should be subject to the same rate of taxation. If it is deemed necessary that all be taxed alike the state may, in the exercise of its inherent power of eminent domain take from plaintiff-in-error the benefit of its peculiar contract and thus subject it to the same method of taxation as is applicable to other railway com-

panies. In such case the state will be required to make compensation.

It is therefore not necessary to hold that the territorial legislature intended to forever preclude the state from exercising a method of taxation different from that prescribed in the charter. The members of the territorial legislature undoubtedly knew that such contract provisions might be annulled through the power of eminent domain upon making compensation, and might well have concluded that if it became of sufficient importance, the state would take this action and make compensation as the constitution requires.

There can be no doubt that the territorial legislature did intend to confer upon the company created the benefit of a perpetual contract as to taxation. It was intended that the company should have either the benefit of a perpetual contract or the benefit of compensation made for the annulment of the contract. This has been in the past the view of the supreme court of Minnesota.

In *First Div. Co. v. Parcher* (Gil. p. 253), the court said:

> "In addition to what was there said it is entirely proper for us to refer to the state of things existing when the policy to be adopted was under consideration by the legislature. The state was then almost a wilderness, its population was small and sparse, its capital limited, its business depressed, its resources undeveloped. There was not a mile of railroad within its borders. An outlet by rail for the products of the state was a matter of prime and pressing necessity. The inducements which

> we were able to hold out to secure this outlet and the construction of needed lines of railway consisted rather in what the state was to be than in what it was. The country at large had hardly recovered from the financial revulsion of 1856-7. How soon railroads in this state would prove remunerative to their owners, as well as how soon the lands would sell, were matters of conjecture and experiment. And notwithstanding repeated and continued tenders of all the roads, lands and franchises, together with the privileges and exemptions in regard to taxation, it was not until the summer of 1862 that the first ten miles of railway were put into operation in this state. These facts are not without weight in considering whether the grant of lands, without the exemption from taxation, would probably have induced capital to undertake the construction of the roads, especially when we take into account the proverbially high rates of taxation in newly-settled communities."

In *St. Paul v. St. Paul & Sioux City Co.*, supra, the court, p. 471-472, said:

> "It is part of the legislative history of the state that its policy in regard to the taxation of this and the other land-grant railroads, so called, was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state, and every portion thereof, so far as possible, an ultimate and adequate return for the value of the franchises conferred, including this immunity from taxation. It is also a part of this well-known history that, in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act among the four original land-grant companies, in 1857, the then territory (now state) adopted a distinct and special policy of taxation in reference to those companies and the lines of

road which they were authorized to build, looking to the early completion of those lines, and the just rights and interests alike of the companies, the state at large, and all localities therein. This policy contemplated, as a basis of taxation, the annual gross income or earnings of the companies, instead of an ad valorem assessment or valuation of their franchises and property; and, instead of a general and local system of taxation, the payment of a fixed per centum of their annual earnings into the state treasury, for the benefit of the whole state, was provided for in lieu of all taxes whatsoever. This, it was supposed, would prove less vexatious and burdensome to the companies, especially in the infancy of their existence; ultimately more advantageous and productive to the revenues of the state, and clearly more just and equal to all localities therein, as all would share equally in the benefit to accrue from taxes raised and contributed on account of property held under franchises derived from the whole people. Experience is fast demonstrating the wisdom of this policy, and realizing the expectations of its founders."

In *County of Traverse v. Manitoba Co.*, supra, the court, p. 423, 424, said:

"It is a part of the legislative history of Minnesota, both as a territory and a state, that its policy in regard to taxing land-grant roads was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state what was supposed an ultimate and adequate return for the value of the franchises conferred, and which would in the long run, be the equivalent of the companies' fair share of taxation. The policy adopted was to provide for these companies paying to the state a certain percentage of their gross earnings in lieu of all

> other taxation on their railroads, and also on their granted lands until sold by the company; this latter being (unfortunately, as subsequent experience has proven) without limitation as to time."

The purpose of the territorial legislature and of the earlier legislatures of the state, was to secure railroad facilities and to bring about that result the legislatures intended to and did make special contracts as to the method of taxation. The making of the contract as to taxation was a means to the desired end. It was not in itself the end and purpose of the legislation.

The State in the court below (Trans. p. 358) rested its claim that the charter provision did not constitute a contract as to the taxation of the railroads largely upon language used in the concurring opinion in *Stearns v. Minnesota*, 179 U. S. p. 256, as follows:

> "Nor does it seem to me that the decisions of the Minnesota courts which are referred to as showing that under the *constitution of that state* it was competent for the legislature to enact a gross receipts tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. In no single one of these cases was the question of irrepealable contract presented, considered or decided in any form."

That the language above quoted did not refer to provisions as to taxation contained in territorial charters is evident from the first sentence of the quotation. The court was discussing the power of the legislature of the state, after its admission

into the union, to create an irrepealable contract with reference to taxation. The laws before the court in the Stearns case and which were claimed to create irrepealable contracts were laws enacted after the admission of the state into the union, namely, the acts of February 23, 1865, and March 4, 1870.

That a distinction exists between enactments passed after the admission of the state into the union and the enactments of the legislative assembly of the territory, is recognized by the supreme court of Minnesota in the case of *State v. Stearns,* 72 Minn. 200. The court in this case, page 223, said:

> "There is no decision of this court which holds that *statutes of the state* providing for the payment of a gross earnings tax by railway companies and exempting their property from taxation in specie upon the basis of a cash valuation were constitutional prior to their ratification by the amendment of 1871, Art. 4, Sec. 32a. There is a clear intimation to the contrary *in several cases, notably in those which follow the Parcher case,* 14 Minn. 224 (297), *sustaining the validity of territorial statutes providing for a gross earnings tax for the old land-grant railway companies; that is, those which are organized under charters granted prior to the adoption of the constitution.*"

III.

THE ACTS OF MARCH 2 AND MARCH 4, 1865, WERE CONSTITUTIONAL. AFTER THEIR ENACTMENT AND ACCEPTANCE THE CONTRACT CREATED BY THE ACT OF MAY 22, 1857, CONTINUED IN FULL FORCE AND EFFECT, MODIFIED ONLY AS TO THE TIME WHEN THE OBLIGATION TO PAY TAXES WOULD ARISE AND AS TO THE RATE OF TAXATION.

For the purpose of this point we assume that the St. Paul Company and the First Division Company succeeded to and at the dates of the passage and acceptance of the acts of March 2 and 4, 1865, were possessed of the contract created by the act of May 22, 1857. That the assumption is correct will appear from point IV of this brief.

(A) IT WAS COMPETENT FOR THE PARTIES TO MODIFY AND BY THE ACTS OF MARCH 2 AND MARCH 4, 1865 THEY DID MODIFY THE PREVIOUSLY EXISTING CONTRACT CREATED BY THE ACT OF MAY 22, 1857.

(1) THE ACT OF MAY 22, 1857, AND EACH OF ITS PROVISIONS WAS BY THE CONSTITUTION OF THE STATE ADOPTED AND CONTINUED IN FORCE AS A CONTRACT OF THE STATE.

Minnesota adopted a constitution on October 13, 1857, and was admitted into the union May 11,

1858. The constitution contained, among others, these provisions:

Article IX.

"Sec. 1. All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state.

Sec. 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also all real and personal property according to its true value in money; but public burying grounds, public school houses, public hospitals, academies, colleges, universities and all seminaries of learning, all churches, church property used for religious purposes and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose and personal property to an amount not exceeding in value two hundred dollars for each individual shall by general laws be exempt from taxation."

Attached to and forming a part of the constitution is a schedule, which in section 1 provides:

"That no inconvenience may arise by reason of a change from a territorial to a permanent state government, it is declared that all rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place."

Art. IX, Secs. 1 and 3 of the constitution were ineffective to destroy the contract created by the act of May 22, 1857.

Gunn v. Barry, 15 Wall. 610, 623.
Gas Co. v. Gas Light Co., 115 U. S. 650, 672.
Bier v. McGehee, 148 U. S. 137, 140.

But the framers of the constitution did not attempt to impair pre-existing contracts. By section 1 of the schedule to the constitution all existing contracts are preserved and continued in full force and effect. By section 1 of the schedule the act of May 22, 1857, and all its terms and provisions were continued in force as a law of the state, as though written in the constitution.

In *First Div. Co. v. Parcher*, supra, the court (Gil. 250), said:

> "Another point presented by the defendants is that even if the territorial legislature could bind the territory, it had not power to alienate or abridge the sovereign authority of the future state. The doctrine laid down in Dartmouth College v. Woodward, 4 Wheat. 651, would be a sufficient answer to this position. In that case a charter granted by the king whose authority had been overthrown by a revolution was upheld as a contract which could not be impaired by the government of New Hampshire. In the case at bar the state government was but the successor in a peaceful and regular manner of the territorial government. But section 1 of the schedule of our constitution sets this matter at rest when it says: 'That no inconvenience may arise by reason of a change from a territorial to a permanent state government it is declared that all rights * * * and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place.' This provision was, perhaps, unnecessary, but it is at any rate decisive."

It is clear, then, that after the admission of Minnesota as a state the act of May 22, 1857, remained an irrepealable contract.

(2) THE ACTS OF MARCH 2 AND 4, 1865, DO NOT IMPOSE ADDITIONAL TAXATION, BUT MERELY MODIFY THE ORIGINAL CONTRACT AS TO TAXATION.

Railway Co. v. Pfaender, 23 Minn. 217, 223.

St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469, 474.

State v. Northern Pac. Co., 36 Minn. 207, 209-210.

County of Stevens v. Manitoba Co., 36 Minn. 467, 471.

County of Traverse v. Manitoba Co., 73 Minn. 417, 425.

The act of March 2, 1865, provided:

"That in consideration of an annual payment of a per centum as provided in this section by said corporation as aforesaid, the railroad, its appurtenances and appendages and all other property, estate and effects of said corporation which by the provisions of this act contained said corporation is to acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all taxation and from all assessments; and in consideration of the grants made to and the privileges and franchises conferred upon the company hereby created, and of the exemption contained in this section the said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March of each and every year, pay into the treasury of the state one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after the said railroad shall be

completed and in operation; and shall during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this state on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad, and shall from and after the expiration of ten years from the completion of thirty miles of said railroad, on or before the first day of March of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad, and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessment whatever.

And for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this state on or before the first day of February in each year, the truth of which abstract shall be verified by affidavits of the treasurer and secretary of said company; and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstract full power is hereby vested in the Governor of this state or any other person appointed by law prescribed, to examine under oath the officers and employes of said company or other persons; and if any person so examined by the Governor or other authorized persons shall knowingly or wilfully swear falsely concerning the matter aforesaid every such person is declared to have committed perjury.

And for securing to the state the payment of the aforesaid per centum it is hereby declared that the state shall have a lien upon the railroad of said company and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company; Provided further, that the lands of said company shall be sub-

ject to taxation as soon as sold, leased or contracted to be sold or leased."

(Trans. pp. 167-168).

The act of March 2, 1865, did not require any formal acceptance.

The act of March 4, 1865, provided:

"Sec. 1. Whenever any lands heretofore or hereafter granted to the St. Paul and Pacific Railroad Company to aid in the construction of its road or branches, shall be contracted to be sold, conveyed or leased by said company, the same shall be placed upon the tax list by the proper officers for taxation, as other real estate, for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made; but in enforcing the collection of the taxes thereon, the title or interest of the said company or of any trustee or mortgagee thereof, shall be in no wise impaired or affected thereby, but the improvements thereon, and all the interest of the purchaser or lessee therein may and shall in case of default of the payment of taxes upon such land, be sold to satisfy the same; and it shall be the duty of the proper officers to assess and collect such taxes, in acordance with the general laws relating to the assessment and collection of taxes, and the provisions of the several acts in relation to the taxation of the lands of said company, so far as the mode of taxing such lands conflicts with the provisions of this act, shall be and they are hereby repealed.

Sec. 2. Upon the filing by said company in the office of the secretary of state of a notification of its acceptance of this act, the same shall thereupon become obligatory upon the state as well as upon said company; provided that said notice of acceptance shall be given within sixty days."

(Trans. p. 169).

In *Railway Co. v. Pfaender*, supra, the court, with reference to the original charter as amended by the act of March 2, 1865, said:

> "By the terms of the *section as amended* the exemption from assessment and taxation was granted in consideration of the annual payment of the specified per centum of gross earnings to commence as soon as and whenever the requisite amount of railroad was completed and in operation; and the obligation to make this annual payment rested upon the consideration, not only of such exemption but the grants made to and the privileges and franchises conferred upon the company in respect to its entire road or lines of road. The obligation assumed by the state in making the grant and that of the company in receiving it to make the required payment in lieu and in full of all assessment and taxation were in a certain sense mutual and reciprocal obligations; and it was obviously the intention of the state that the grant of immunity from taxation should be treated and regarded as in the nature of a conditional grant charged with the perpetual burden of the annual payment therein provided, and which was to commence whenever and as soon as any portion or portions of the road to which the grant applied amounting in all to thirty miles, should be completed and put in operation."

In *St. Paul v. Railroad Co.*, supra, the question was the construction of the contract as to taxation contained in the charter of the St. Paul and Sioux City Railroad Company. That company had been incorporated under an act of the legislative assembly of the territory of Minnesota entitled "An act to incorporate the Root River Valley & Southern Minnesota Railroad Company," approved March 2, 1855. By section 9 of an act of May 22, 1857, a

grant of land had been made to this company to aid in the construction of its railroad. The act granting the lands also provided for the payment of three per centum of the gross earnings of the road in lieu of all other taxes. By Chapter 1 of the Special Laws of 1864, page 160, it was provided that the Minnesota Valley Company, the successor to the Root River Valley and Southern Minnesota Company should, in lieu of all other taxes and assessments, pay a percentage of its gross earnings, namely, one per cent for the first three years after the completion of thirty miles of its road, two per cent for the next seven years and three per cent thereafter, the provisions of the act being similar to those of the act of March 2, 1865. The court, on page 474, said:

> "As to each such new corporation the same rule was adopted in language incapable of misconstruction, thereby removing all doubt as to the intention of the legislature. By this new rule each company is required, for the first three years after the completion of thirty miles of its road, to pay annually one per cent of its gross earnings, for the next seven years two per cent, and thereafter three per cent, in lieu of all taxation and assessment whatever. This would seem to show that the word 'taxes' as employed in the phrase 'in lieu of all taxes whatever' in section 9 of the act of 1857 was used in its broadest sense, as including both general and local taxation, analogous to the like use of the word in section 1, Art. IX of the constitution, as held by this court in Stinson v. Smith, 8 Minn. 366. Be this as it may, however, there can be no doubt that the amendment of defendant's charter in 1864 (Sp. Laws 1864, c. 1. subc. 2, sec. 3. p. 160), which in terms declares an exemption from 'all taxa-

tion and from all assessments' and that the payment of the per centum annually as therein provided 'shall be and is in full of all taxation and assessment whatsoever' protects the company against any assessment, for local improvements such as is sought to be imposed in this case."

In *State v. Northern Pac. Co.*, supra, the court said:

"When that act (the act of 1877) was passed the time had already become fixed by the construction of thirty miles of the St. Paul and Pacific road from which the percentage prescribed by the act of 1865 was to be computed; and the state had become entitled to receive and the St. Paul and Pacific Company had become obligated to pay the percentage so determined of the earnings not only of so much of the whole road or system as had then been constructed, but also what might thereafter be constructed under the charter of that company. That obligation of the corporation towards the state on the one hand and on the other the franchises, grants and privileges which the corporation had received and enjoyed from the state, were parts of an entire plan embodied in the charter and legislation above referred to. The grant was subject to the prescribed obligation. The one was the consideration for the other."

In *County of Stevens v. Manitoba Co.*, supra, the court said:

"By the terms of the earlier of these acts (the acts of March 2 and March 4, 1865), it was provided that the lands of the St. Paul and Pacific Company should be subject to taxation as soon as sold, leased or contracted to be sold or leased. For the purpose of this case it is unnecessary to consider what would have been the effect of this enactment if with-

out modification it had been accepted by the corporation; for it does not appear that there was any acceptance of the provisions of that act prior to the enactment of March 4th. The *modification of the right of exemption expressed in the act of March 2nd* (assuming that, standing alone, it should be construed as rendering the title still remaining in the railroad company taxable as soon as the lands should be contracted to be sold) could only have been made effectual by the assent of the corporation; for the exemption previously existing was a contract right which the state alone had not the power to impair. First Div. Co. v. Parcher, 14 Minn. 224 (297). Nor until its acceptance, at least, was the act of March 2nd effectual to place any constitutional restraint upon the power of the legislature to enlarge the exemption proposed in it, so that the exemption created in 1857 should be subject to a less restriction or limitation than was expressed in the act of March 2nd."

In the case at bar the supreme court of Minnesota (Trans. p. 351), said:

"By Chapter 6, Special Laws 1865, the legislature *modified the original charter* by providing for the payment of one, two and three per cent, instead of a uniform rate of three per cent. This act was accepted by the St. Paul and Pacific Company and acquiesced in by the First Division Company by a compliance with its provisions. By this *modification* defendant's predecessors received and retained the benefit of an average annual reduction in their taxes of about forty per cent for the period of ten years."

(3) THE LEGISLATURE OF THE STATE HAD POWER UNDER THE CONSTITUTION TO MAKE A VALID AND IRREPEALABLE CONTRACT MODIFYING THE PROVISIONS AS TO TAXATION OF THE ACT OF MAY 22, 1857.

First Div. Co. v. Parcher, 14 Minn. 297 (Gil. 224, 234).

State v. Railroad Co., 21 Minn. 315, 318.

Railway Co. v. Pfaender, 23 Minn. 217, 221.

St. Paul v. St. Paul & Sioux City Co., 23 Minn. 469, 474.

State v. Nor. Pac. Co., 36 Minn. 207.

County of Stevens v. Manitoba Co., 36 Minn. 467, 472.

State v. Stearns, 72 Minn. 200, 223.

County of Traverse v. Manitoba Co., 73 Minn. 417, 425.

New Jersey v. Yard, 95 U. S. 104, 115, 116.

State v. Commissioner, 37 N. J. Law, 240, 248.

In *First Div. Co. v. Parcher*, the court, speaking of the act of March 10, 1862, said:

> "It is plain that these sections operated to transfer to the persons named all the roads, lands and franchises of the Minnesota and Pacific Railroad Company which, as we have endeavored to show, the state had acquired; and so far there can be no objection taken to the action of the legislature."

In *State v. Railroad Co.*, the court said.

> "And it follows that its effect in permitting the state, by the foreclosure or forfeiture, to acquire, hold and transfer the immunity from taxation according to the doctrine of the Parcher case, is not controlled or overridden by the general constitutional provision in regard to taxation before quoted. In reference

> to the case of Trask v. Maguire, 18 Wall. 391, we think it may be distinguished in some important respects from the case at bar; but if it be in point we should not deem it our duty to recede from or overrule the views expressed in the Parcher case upon its authority."

In *St. Paul v. St. Paul & Sioux City Co.*, the original provision as to gross earnings taxation required the payment of three per cent of the gross earnings after the completion of fifty miles of road (Sp. Laws 1857, ch. 1, subch. iii, sec. 9, p. 21, *infra* p. 77-78). In 1864 this provision had been amended so as to provide:

> "That the lands granted, or intended to be granted, by the provisions of this act, shall be and are hereby exempted from all assessments, and from all taxation whatsoever, until the same shall have been sold and conveyed by the said company, and in consideration of an annual payment of a per centum (as provided in this section) by said company, the said railroad and its appurtenances and appendages, and all other property, estate and effects of said company, and also the stock and capital of said company, shall be and hereby are forever exempt from all taxation and from all assessments; and in consideration of the grants made to and the privileges and franchises conferred upon the said company, and of the exemption contained in this section, the said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year, pay into the treasury of the state, one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after thirty miles of the said railroad shall be completed and in operation, and shall, during the seven years next ensuing, after the expira-

tion of the three years aforesaid, pay into the treasury of this state, on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad, and shall, from and after the expiration of said seven years, on or before the first day of March of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroads; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the Treasurer of this state, on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the Governor of this state, or any other person appointed by law to examine under oath the officers and employes of said company, or other persons; and if any persons so examined by the Governor or other authorized person, shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the state the payment of the aforesaid per centum, it is hereby declared that the state shall have a lien upon the railroad of said company, and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company."

(Sp. Laws 1864, ch. 1, subc. II, sec. 3, p. 160).

The court said:

> "There is no force in the suggestion that the legislature had no constitutional power to enact this amendment because of the limitations upon the taxing power imposed by sections 1 and 3 of Art. 9 of the constitution. The line of railroad in question, together with the lands, property, immunities and franchises pertaining thereto is held under a grant made prior to the adoption of the constitution and is hence unaffected by any of its provisions relating to the taxing power and the mode in which it shall be exercised. This was fully settled by this court in the analogous case of First Div. Co. v. Parcher, 14 Minn. 297 (Gil. 224). Upon the renewal of the grant in 1864 to the present company it was therefore clearly competent for the legislature to change and modify its terms and conditions so as to require the annual payment of a different rate per cent of the gross earnings of the road, to commence upon the completion of thirty instead of fifty miles, and, in consideration of such annual payment, to exempt the railroad, its appurtenances and other property from all taxation and from all assessments, both general and local."

In *County of Stevens v. Manitoba Co.*, the court said:

> "The point that sections 1 and 3, Art. 9 of the constitution forbid this legislation (acts of March 2 and 4, 1865) was long ago settled in the Parcher case above cited, and in the cases of State v. Railroad Co., supra, and St. Paul v. St. Paul & Sioux City Co., supra; it being held that those sections of the constitution did not prevent the legislature from modifying the terms of a provision for the payment of a percentage of gross earnings in lieu of other taxation in a case where that method of taxation had been established prior to the adoption

of the constitution, and, in the latter case cited that by the constitutional amendment of 1871 (Sec. 32, Art. 4), such legislation had been confirmed.

The claim that the act of March 4th is inconsistent with the general tax law of 1878 and so was repealed thereby, cannot be sustained. We need not here enter into an examination of these laws to determine whether they are inconsistent; for the prior enactment embodied the elements of a contract between the state and the corporation which had been enforced and acted upon both by the state and by the company for many years, and its annullment by the act of the state alone was impossible under the Federal constitution."

In *County of Traverse v. Manitoba Co.*, the court said:

"But there can be no question but that the acts of 1865 already cited included the increased as well as the original grant and in terms applied a commuted system of taxation to the whole. This court has twice decided that the provisions of these acts (acts of March 2 and March 4, 1865) exempting the roads and land-grant lands from ordinary taxation in consideration of the payment of a percentage of the gross earnings of the road were as to the territorial land grant companies not in conflict with the provisions of the constitution relating to taxation. State v. Railroad Co., supra, St. Paul v. St. Paul & Sioux City Co., supra."

In *New Jersey v. Yard*, the court said:

"There was a well understood subject of contract. The corporation wished authority to build a branch road or roads, with favorable route, and power to acquire right of way; and the state wished the vexed question of the right to tax the corporation to be settled. For

the company denied the right of the state to tax them under their charter, until the road paid them a net income of seven per cent per annum on its cost.

The legislature said, If you will consent to pay one-half of one per cent tax as originally agreed and commence to do this within one year from the time the road shall be open and in use to Phillipsburgh, we will authorize an increase of ten millions of your capital stock and the franchises you seek as to the branch roads, and will agree that the tax shall be fixed at one-half of one per cent. Here was a subject of disagreement adjusted, additional rights granted, and the tax fixed, both as to its rate and the time of commencement."

Again, on p. 117:

"But of the existence of the present contract there is no doubt. Its meaning and its terms are clear enough, and, taken alone, no one denies but that it is a contract which would be protected by the constitution of the United States."

In *State v. Commissioner*, the supreme court of New Jersey said:

"But the chief argument on this part of the case, in support of this assessment was, that contracts which oust the state of the sovereign power of taxation, were to be strictly construed, and that when once departed from by the consent of the privileged party, they ceased to have any binding force. This argument was applied not only to the act of 1869, but more especially to the prior acts of 1846 and 1864, in relation to the New Jersey Railroad Company. * * *

If, by the second of these propositions be meant that an exemption from general taxation once surrendered cannot be resumed, it is also conceded. But if it be meant that a cor-

poration having such exemptions by an irrepealable charter, cannot contract with the state for a modification of the special taxation therein imposed, and yield part and accept other terms in lieu thereof, without surrendering the whole, the argument is without legal foundation.

A contract with a corporation once made is the same as a contract with an individual. Both are equally within the protection of the constitutional provision. Neither can be impaired except by compact and agreement of the parties, founded on a sufficient consideration, and the original obligation remains intact, except so far as altered by mutual consent.

The contract the prosecutors rely on is an agreement on their part to pay a per cent on capital stock, together with certain transit duties, and an agreement on the part of the state that no other tax or impost shall be levied or assessed upon them; in order words, that they should not be subject to general taxation in any form at the will of the legislature. Corporations having contracts of this character with the state, may consent to other taxation, or to a different mode of assessment from that specified in their charters, by the acceptance of subsequent legislative acts, without impairing the general exemption in their charters. In such event the new taxation, or new mode of assessment, becomes part of the original contract, and modifies its terms to that extent, leaving the restriction therein on further taxation in full force."

In the case at bar the supreme court of Minnesota (Trans. p. 351), said.

"By this modification defendant's predecessors received and retained the benefit of an average annual reduction in their taxes of about forty per cent for the period of ten years. This amounted to a practical construc-

> tion of the contract so far as involving the right of the state to change the rate, and if the old companies were here contesting the validity of the present statute increasing the rate their denial of the power of the state to so act would come at least with little or no force. While their acquiescence in the prior change would perhaps not be conclusive against them, it furnishes strong evidence that the old charter was not regarded at the time as irrepealable."

The inference drawn by the supreme court of Minnesota from the modification of the original contract made by mutual consent of the parties seems to us to be clearly a *non sequiter*. It is a well established principle of law that parties may always modify their contracts by mutual consent, based on a valid consideration. This principle does not authorize the repudiation of a valid contract by one party against the will of the other.

The language of the supreme court of Minnesota in *County of Stevens v. Manitoba Co.*, 36 Minn. 467, 471, seems to state the principle more correctly. The court there said:

> "The modification of the right of exemption expressed in the act of March 2nd (assuming that, standing alone, it should be construed as rendering the title still remaining in the railroad company taxable as soon as the lands should be contracted to be sold) could only have been made effectual by the assent of the corporation; for the exemption previously existing was a contract right which the state alone had not the power to impair."

See also Railroad Co. v. Sandford, 164 U. S. 578.

The court in the County of Stevens case seems to recognize the distinction between a modification of a contract by mutual consent of the parties and the repudiation of the contract by one party alone.

(4) IF THE ACTS OF MARCH 2 AND MARCH 4, 1865, DID NOT MODIFY THE ORIGINAL CONTRACT AS TO TAXATION, THE ORIGINAL CONTRACT REMAINS IN FULL FORCE.

That the act of May 22, 1857, section 18, created an irrepealable contract as to the taxation of the railroads authorized to be built under the act, cannot be disputed. It was beyond the power of either party, acting alone, to abrogate the contract.

County of Stevens v. Manitoba Co., supra.

The state claims that the legislature had not power to make a valid contract modifying the original contract as was attempted to be done by the acts of March 2 and March 4, 1865, but that it did have power to repeal and did repeal the original contract by the acts of 1865. If the legislature had no power to pass the acts of March 1865, and if these acts remained void after being accepted by the St. Paul Company and the First Division Company, the original contract has never been modified. A valid law can be repealed only by another valid law. A valid contract can be rescinded or modified only by a subsequent valid contract of rescision or modification.

County of Stevens v. Manitoba Co., supra.

State v. Commissioner, supra.

The state has at all times since the passage of the acts of March, 1865, insisted that the St. Paul Company and its successors pay, and the St. Paul Company and its successors have paid taxes in accordance with the act of May 22, 1857, as amended by the later acts. If the state was entitled to repudiate the acts of 1865 and insist upon payment of three per cent gross earnings from the time of the completion of fifty miles of road as provided in the original contract, it should have so insisted and have collected taxes on that basis. That it has not done so is cogent evidence that the acts of 1865 were as much to its advantage as to the advantage of the railroad company.

(5) THE MODIFICATION OF THE ORIGINAL CONTRACT WAS BASED UPON A VALID CONSIDERATION.

New Jersey v. Yard, supra.

By the original contract the railroads were taxable only after fifty miles of road had been completed. By the amended contract the railroads became taxable after thirty miles of road were completed. By the original contract the rate was a flat three per cent. By the amended contract the rate was made one per cent for the first three years, two per cent for the next seven years, and three per cent thereafter. By the original contract the granted lands were taxable only after they had been sold and conveyed. By the amended contract the lands became taxable as to the interest of the purchaser or lessee as soon as contracted to be sold or leased.

At the date of the modification thirty miles of road had already been completed, having been completed in November, 1864. Immigrants were moving in and settling on the lands, which they purchased from the railroad on long term contracts, the conveyance to be made only when payments were completed. These settlers made improvements upon the lands long before receiving a conveyance. As the country settled up police protection and municipal government became necessary and it was important that these lands be taxable to support the local county and town governments. This benefit was secured to the state by the amendment.

It is impossible to say when the state would have received any taxes under the original contract, because it is matter of conjecture when the fifty miles of road would have been completed under that contract. The act of March 2, 1865, was entitled "An act to facilitate the completion of the St. Paul and Pacific Railroad and Branches." Evidently the legislature felt that by modification of the contract the completion of the roads would be expedited.

The supreme Court of Minnesota in the case at bar (Trans. p. 351), said:

> "By this modification defendant's predecessors received and retained the benefit of an average annual reduction in their taxes of about forty per cent for the period of ten years."

It is submitted that this conclusion does not by any means follow from any facts which appear in the record in this case. It is evident from the record that by the modification the state began to receive taxes at least two years before it would have received any under the original contract, and that the lands which were only contracted to be sold became at once taxable as to the purchasers' interest. That the saving in taxes to the railroad company during the period from 1865 to 1875 amounted to forty per cent cannot be asserted with any degree of positiveness, because if the original contract had not been modified the railroad might not have become taxable until long after 1875.

In any event, however, it is safe to assume that the state has received under the amended contract, from the railroad company and from the purchasers of the granted lands, more taxes than it would have received under the original contract, because if the state had felt that the contract was not to its advantage it would doubtless have attempted to repudiate it long ago.

(6) THE ACCEPTANCE OF THE ACTS OF MARCH 2 AND MARCH 4, 1865, BY THE ST. PAUL COMPANY, BOUND ALL ITS SUCCESSORS IN OWNERSHIP OF THE ROADS INVOLVED.

Railway Co. v. Pfaender, 23 Minn. 217, 220.
State v. Nor. Pac. Co., 36 Minn. 207, 209.

On March 16, 1865, the St. Paul Company by one and the same instrument accepted both acts (Trans.

pp. 35, 170). On April 29, 1865, the First Division Company accepted the act of March 4, 1865 (Trans. p. 171). The St. Paul Company, the First Division Company, the Manitoba Company and plaintiff-in-error have at all times paid taxes on the earnings from the lines of road here involved as provided in the acts of March 2 and March 4, 1865 (Trans. pp. 36, 37, 38, 42).

In *Railway Co. v. Pfaender*, the court said:

> "Whether, however, we are correct in this or not, is not very material as it is clear from its title, its express provisions and the whole context of the statute (the act of March 2, 1865), that it does so apply, and that the St. Paul and Pacific Company is therein regarded and treated as holding the ownership and control of all such lines of road and the franchises pertaining thereto; and inasmuch as that company accepted the provisions of the statute and its benefits, neither it nor any company subsequently acquiring title through it to any portion of such lines is in a position to assert a different state of things than that assumed by the statute upon the faith of which, apparently, its provisions were framed."

In *State v. Nor. Pac. Co.*, the court said:

> "After the construction and putting in operation of thirty miles of road composing any part of the entire line or system of the St. Paul and Pacific Railroad Company the rate per centum prescribed by the act of (March 2) 1865, became at once applicable to the entire system, so far, at least, as the same was constructed and operated by that company or by any corporation deriving its existence from it. This was decided in Chicago, Mil. & St. Paul Ry. Co. v. Pfaender, 23 Minn. 217."

(B) THE STATE AS TRUSTEE OF THE LANDS GRANTED BY THE UNITED STATES TO AID IN THE CONSTRUCTION OF THE RAILROADS HERE INVOLVED HAD POWER UNDER THE STATE CONSTITUTION TO PASS THE ACTS OF MARCH 2 AND MARCH 4, 1865.

First Div. Co. v. Parcher, 14 Minn. 297 (Gil. 224, 230, 253).

St. Paul v. St. Paul & Sioux City Co., 23 Minn. 469, 471-472.

County of Traverse v. Manitoba Co., 73 Minn. 417, 422.

Stearns v. Minnesota, 179 U. S. 223, 240, 252-253.

The Congress of the United States by section 1 of an act approved March 3, 1857 (11 Stat. at L. p. 195), granted to the territory of Minnesota for the purpose of aiding in the construction of certain railroads in the act described, every alternate section of land designated by odd numbers, six sections in width on each side of the roads and branches described. It was provided that the lands granted should be exclusively applied to the construction of that road for and on account of which the lands were granted. Among the railroads described in the act were a line from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North.

By the act of May 22, 1857, the territory of Minnesota accepted the grant and proceeded to execute the trusts thereby imposed upon it. The act was entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said territory,'" etc. By subchapter 1 of the act the Minnesota Company was created a corporation. Certain of the lands granted by the act of Congress of March 3, 1857, were granted to the Minnesota Company and by section 18 of subchapter 1 the method of taxing the railroads authorized, and the land-grant, was provided.

By subchapter 2 of the act a grant of lands was made to the Transit Railroad Company, a corporation already in existence, the same having been created by an act of the legislative assembly of the territory of Minnesota entitled "An act to incorporate the Transit Railroad Company," approved March 3, 1855. The grant to the Transit Company was accompanied by a provision as to the payment of gross earnings tax in lieu of other taxes as follows:

> "Sec. 4. The said lands so granted shall be and are exempted from all taxation until the same shall have been sold and conveyed by said company. In consideration of the grant of land and other franchises and privileges hereby confirmed in and conferred on the Transit Railroad Company, the said company shall pay into the treasury of the Territory or State of Minnesota three per cent upon all the gross earnings of said road, the amount of the gross

earnings to be ascertained by the verified statement of the President and Treasurer of said company as hereinbefore provided for; and the said three per cent shall be so paid into the treasury of the Territory or future State of Minnesota within sixty days after any portion of the said road shall be operated, and annually thereafter; and the same when paid, shall be in lieu of all taxes whatever."

(Sp. Laws 1857, Ex. Sess. ch. 1, subch. II, Sec. 4, p. 17).

By subchapter 3 of the act grants of lands were made to the Root River Valley and Southern Minnesota Railroad Company, a corporation organized by an act of the legislative assembly of the territory entitled "An act to incorporate the Root River Valley and Southern Minnesota Railroad Company," approved March 2, 1855, and to the Minneapolis and Cedar Valley Railroad Company, a corporation created by an act of the legislative assembly of the territory of Minnesota entitled "An act to incorporate the Minneapolis and Cedar Valley Railroad Company," approved March 1, 1856. These grants were accompanied by a gross earnings tax provision as follows:

"Sec. 9. The said lands so granted shall be and are exempt from all taxation until the same shall have been sold and conveyed by said companies. But so soon as the said companies shall have respectively constructed, equipped and put in operation fifty miles of railroad for the transportation of freight and passengers, the said companies shall severally pay into the treasury of the Territory or State of Minnesota, in lieu of all taxes whatsoever, upon the property of said companies respective-

ly, the sum of three per cent annually, on the gross earnings of each of said roads."

(Sp. Laws 1857, Ex. Sess. ch. 1, subch. III, sec. 9, p. 21).

The vicissitudes through which these four original land-grant companies passed are stated in:

Huff v. Winona & St. Peter Co., 11 Minn. 181 (Gil. 114).

Fitz v. Minnesota Central Co., 11 Minn. 414 (Gil. 304).

First Div. Co. v. Parcher, 14 Minn. 297 (Gil. 224).

State v. Winona & St. Peter Co., 21 Minn. 315.

St. Paul v. St. Paul & Sioux City Co., 23 Minn. 469, 472-473.

It was within the power of the state, acting as trustee of the land-grant, to make such contract with reference to the taxation of the roads for whose benefit the grant was made as in its opinion would best accomplish the objects of the trust.

In *First Div. Co. v. Parcher*, the court, page (Gil.) 230, said:

> "As a recipient of the congressional land grant, the state had assumed a trust which good faith and public interest required to be discharged in the way most likely to accomplish its purposes. That it was necessary to hold out great advantages in order to induce parties to enter upon and prosecute the construction of the roads, is matter of history. The long delays and repeated discouragements which the people of this state experienced in their attempts to secure convenient communication with the markets of the country are familiar to all."

In *St. Paul v. St. Paul & S. C. R. Co.*, supra, the court, p. 472, said:

> "It is also a part of this well known history that, in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act among the four original land-grant companies, in 1857, the then territory (now state) adopted a distinct and special policy of taxation in reference to those companies and the lines of road which they were authorized to build, looking to the early completion of those lines, and the just rights and interests alike of the companies, the state at large, and all localities therein. This policy contemplated, as a basis of taxation, the annual gross income or earnings of the companies, instead of an ad valorem assessment or valuation of their franchises and property; and, instead of a general and local system of taxation, the payment of a fixed per centum of their annual earnings into the state treasury, for the benefit of the whole state, was provided for in lieu of all taxes whatsoever."

In *County of Traverse v. Manitoba Co.*, supra, the court, p. 422, said:

> "The history of the old territorial 'land-grant' railroad companies, of the land-grant acts of congress, and of the legislation of Minnesota in execution of the trust thereby created, are matters of common knowledge in this state. How the lands here in question were successively granted to the Minnesota & Pacific Railroad Company and the St. Paul & Pacific Company, and how, on the division of the latter, its main line with all its lands, franchises, etc., became the property of the First Division Company are so fully stated in First Division v. Parcher, 14 Minn. 224 (297), commonly called the 'Parcher Case,' that it need not be repeated, but merely sup-

plemented by a statement of the following subsequent events.

By an act of congress passed March 3, 1865 (13 Stat. 526), the land grant of March 3, 1857, was increased from 6 to 10 sections per mile, and the 'indemnity limits' were extended from 15 to 20 miles. By Sp. Laws 1865, cc. 6, 9, this additional grant was given on the terms and conditions therein specified to the St. Paul & Pacific Railroad Company. These two acts were accepted together and at the same time by that company."

In *Stearns v. Minnesota*, supra, this court, p. 240, said:

"But there is another matter of significance. The lands in controversy were granted by Congress to the state as trustee. The act of 1865, by which the state offered the lands to the predecessor of the St. Paul and Duluth Company, is entitled 'An act to execute the trust created by the act of Congress.' The right of a state to accept such a trust cannot now be doubted. It has become a part of the judicial history of the country. These lands were not donated by Congress to the state to be used by it for its own benefit and in its own way, but were conveyed to the state in trust, with the understanding that as trustee it should use them in the best possible manner for accomplishing the purposes of the trust. Of course this implied that, except as restrained by its own powers, the state should make the grant as valuable as possible for the accomplishment of the purpose of the trust. Under those circumstances the peculiar nature of the trust created enabled the state to determine the limits and mode of taxation to which that property thus placed in its hands should be subjected."

Again on page 252:

"But if in its judgment, as trustee, the trust

could be most effectually accomplished by transferring the lands to some corporation, subject to only a limited taxation until such time as the full value of the lands could be secured for the purposes of the trust, it was not prevented from so doing by any obligation which it was under in respect to the general mass of property within the state. When the state accepted the position of trustee it had all the freedom of judgment which belongs to a trustee in respect to the best means of carrying the trust into execution. The legislature was the body representing the state, whose judgment was invoked as to such means, and its action was taken, not so much in discharge of its constitutional obligations to the people, as of its contract obligations as trustee to the grantor of the trust; in other words the state either could not accept the trust, or, accepting it, was entitled to all the freedom of judgment which attends the action of a trustee, and, as we have seen, it is too late in the history of railroad aid legislation in this country to hold that a state cannot accept the position of trustee of such a grant."

Again on page 253:

"For these reasons we are of opinion that there was a valid contract made with these companies in respect to the taxation of these lands—a contract which it was beyond the power of the state to impair; that this subsequent legislation does impair that contract, and cannot, therefore, be sustained."

(C) INDEPENDENT OF ITS POWER TO MAKE A VALID CONTRACT MODIFYING A PREVIOUSLY EXISTING IRREPEALABLE CONTRACT, AND OF ITS POWER AND AUTHORITY AS TRUSTEE OF THE LAND-GRANT, THE LEGISLATURE OF THE STATE HAD CONSTITUTIONAL POWER TO ENACT GROSS EARNINGS TAX LAWS.

It is not necessary to go to this extent to sustain the contract here involved. But the legislative and judicial history of the subject casts some light on our contention.

From the time of its admission into the union under a constitution containing article IX, sections 1 and 3, hereinbefore quoted, the state legislature continued to enact gross earnings laws applicable to railroad companies. Among those enacted were the act of March 8, 1861 (Sp. Laws 1861, c. 1, Sec. 18), making a grant of lands to aid in the construction of a railroad from St. Paul to Lake Superior; the act of March 6, 1863 (Sp. Laws 1863, c. 4), granting lands to the St. Paul Company to aid in building a railroad from St. Paul to Winona; the act of Feb. 16, 1865 (Sp. Laws 1865, c. 1), granting lands to aid in the construction of the Southern Minnesota Railroad; the acts of March 2 and March 4, 1865, hereinbefore discussed; the act of February 23, 1865, discussed in Stearns v. Minnesota; the act of March 4, 1865, relating to the taxation of the Winona & St. Peter Company; the act of March 2, 1870, relating to the taxation of the Minneapolis and St. Cloud Railroad Company (Trans. pp. 329, 330), and numerous

other acts of similar purport. Besides, the state legislature had enacted similar laws taxing mining, insurance, telegraph, telephone and express companies, all of which had been considered as valid and complied with.

In 1871 an amendment to the constitution was adopted, Art. IV, Sec. 32a, as follows:

> "Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted which provides that any railroad company now existing in this state or operating its road therein, or which may be hereafter organized, shall, in lieu of other taxes and assessments upon their real estate, roads, rolling stock and other personal property at and during the time and periods therein specified, pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same shall take effect or be in force, be submitted to a vote of the people of the state and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."

This amendment clearly assumes that gross earnings tax laws have already been enacted by the state, continuing in full force and effect, and that they are valid. It assumes that such laws will be enacted in the future without being submitted to the people except so far as they repeal or amend existing laws.

The provision is a restriction only upon the power of the legislature to amend or repeal gross earnings tax laws after they have already been enacted. The object of the constitutional amendment was

to prevent the future modification of existing gross earnings tax laws (such as had been made in sec. 18 of the act of May 22, 1857, by the acts of March 2 and March 4, 1865), without the consent of the people. The language is most inapt to make an original grant of power. It clearly recognizes the existence in the legislature of power, under the constitution as it existed before the amendment, to enact gross earnings laws.

Less than a year and a half after the adoption of this constitutional amendment the legislature enacted Chapter 111, Special Laws 1873 (App. p. 16-18), which in section 1 provided for the payment of a gross earnings tax in lieu of other taxes by the St. Paul, Stillwater & Taylor's Falls Railroad Company. The law in section 2 provided that any railroad company might accept the terms of the law and pay gross earnings tax in accordance therewith. This law was never submitted to or voted upon by the people as provided in the constitutional amendment of 1871, and the legislature in enacting the law made no provision for such submission.

In 1887 the legislature enacted Chapter 11 of the Laws of that year (App. p. 17), which provided that all railway companies, whether they had theretofore accepted Chapter 111 of the Special Laws of 1873 or not, must pay gross earnings tax in accordance with the 1873 law. Chapter 11 of the laws of 1887 was never submitted to or voted upon by the people, and the legislature made no provision for such submission. Notwithstanding this

the railroad companies operating within Minnesota, other than those whose charters specially provided for gross earnings tax paid taxes in accordance with the general law. This was done without question as to the validity of the law, either on the part of the state or the railroad companies.

In 1889 the legislature enacted a law (Ch. 235, G. L. 1889), defining the meaning of the word "gross earnings" and this law was not submitted to the people (App. pp. 17-18).

The Minnesota court never questioned the validity of gross earnings tax laws enacted prior to the adoption of the constitutional amendment until more than twenty years after the amendment was adopted. The first case in which the court questioned the validity of these laws is *State v. Luther*, 56 Minn. 156 (1894). This case involved the act of Feb. 23, 1865. The court, page 162, said:

> "If all such laws are invalid the consequences would be most serious, affecting the taxation not only of railroads but also of mining, insurance, telegraph, telephone and express companies and the like, most, if not all, of which have been taxed for years on the basis of their receipts or earnings. We do not care to pass upon or consider a question of such great importance until it is necessary, and we do not think that the question arises in this case. Conceding, without deciding, that tax laws such as we are now considering were invalid when enacted, still we are of opinion that the effect of the constitutional amendment of 1871 (Art. 4, Sec. 32a), was to validate all such laws relating to the taxation of railway property. To a proper understanding of the meaning and scope of this amendment it is necessary to consider it in the light

of the previous legislative policy of the state on the subject. The system of providing for the payment of a percentage of the gross earnings of the road in lieu of all other taxes on 'railroad property' and on the lands granted to aid in its construction while owned by the company, was inaugurated by the territorial legislatures and was universally in vogue at the date of the adoption of the constitution. And after that time the state legislatures invariably assumed that they continued to possess the power to adopt this system of commuted taxation when granting lands to aid in the construction of a railroad, whether such lands were the absolute property of the state or were held by it in trust for that purpose under an act of Congress. This was the practice not only as to old grants made before the adoption of the constitution, but also as to new grants, both state and congressional, made after that date."

After enumerating a number of the land grants and laws of the state carrying the grants into effect, the court, page 163, proceeds:

"And in every instance the legislature in making or transferring the grant to the railway company provided for the exemption of the lands from ordinary taxation while owned by the company in consideration of its paying to the state annually a certain percentage of the gross earnings of the road. They provided for the same system of taxation for the Northern Pacific Company, which received its grant directly from Congress (Sp. Laws 1870, Ch. 65, § 1).

In brief, the legislature assumed, that when making a grant of lands to aid the building of a railroad or in executing the trust where lands had been granted to the state by Congress for the same purpose (and which, while thus held by the state, either as proprietor or in trust were, of course, not subject to taxa-

tion) it had the power in furtherance of the object for which the grant was made to exempt such lands from ordinary taxation and *to provide for commuted taxation of both the railroad and the granted lands.*

There is not in the history of the state a single grant of lands to aid the building of a railroad where this system of taxation has not been adopted, and we have not found an instance prior to the adoption of the constitutional amendment of 1871 (Const. Art. 4, Sec. 32a), where a commuted system of taxation was provided that did not apply to the land-grant as well as to the railroad property. This amounted to a legislative construction of the constitution which of itself would be entitled to great weight.

In this situation of things the people adopted a constitutional amendment (Art. 4, Sec. 32a). * * *

This language (the language of the amendment) must have been selected and this amendment adopted with reference to the existing legislation and the general legislative policy to which we have referred; and, read and construed in that light it amounts to a clear recognition of the validity of existing laws providing for this commuted system of taxation of railroad property and lands and of legislative power to enact such laws for the future. If it did not refer to this there was nothing to which it could refer. It is by necessary implication a validation of past legislation of that kind and a grant of power to enact it in the future. It is pretty clearly indicated in City of St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469, and County of Stevens v. St. P. M. & M. Ry. Co., 36 Minn. 472, that this was the view then entertained by the court. Within a year and a half after the adoption of this constitutional amendment the legislature passed a general law (Sp. Laws 1878, Ch. 111), providing for

> this system of taxation for any railway company that would accept the provisions of the act, and this system has been universally in vogue down to date without question as to its validity until raised in this case."

It was not until 1898 that the supreme court of Minnesota held that laws of the state, other than those modifying territorial charters, enacted after the adoption of the constitution were invalid until conditionally ratified by the amendment of 1871.

State v. Stearns, 72 Minn. 200.

This case involved the act of Feb. 23, 1865. But it recognized (page 223) the validity of enactments as to taxation applicable solely to the old territorial land-grant companies.

IV.

THE CONTRACT AS TO TAXATION CREATED BY THE ACT OF MAY 22, 1857, AS MODIFIED BY THE ACTS OF MARCH 2 AND MARCH 4, 1865, PASSED BY TRANSFER SUCCESSIVELY TO THE ST. PAUL COMPANY, THE FIRST DIVISION COMPANY, THE MANITOBA COMPANY AND PLAINTIFF-IN-ERROR AND IS NOW OWNED BY THE LATTER.

(A) THE CONTRACT DOES NOT CREATE AN EXEMPTION FROM TAXATION BUT PROVIDES A COMMUTED OR SUBSTITUTED FORM OF TAXATION. IT IS A TAX AGAINST PROPERTY, NOT AGAINST THE PERSON.

Stearns v. Minnesota, 179 U. S. 223.

St. Paul v. St. Paul, S. C. R. Co., 23 Minn. 469, 471.

State v. Nor. Pac. Co., 32 Minn. 294, 295.

Hennepin County v. Manitoba Co., 33 Minn. 534, 535.

County of Ramsey v. Railway Co., 33 Minn. 537.

County of Todd v. Manitoba Co., 38 Minn. 163.

St. Paul v. Manitoba Co., 39 Minn. 112, 113.

State v. Luther, 56 Minn. 156, 160.

County of Traverse v. Manitoba Co., 73 Minn. 417, 425.

State v. Koerner, 85 Minn. 149, 150.

State v. Telephone Co., 120 N. W. 534, 538.

In *County of Hennepin v. Manitoba Co.*, the court said:

> "This is not an immunity from taxation but a commutation of taxes—another and substituted way prescribed by law in which the respondent as the owner of this land among other property is to contribute its share to the public revenue."

In *St. Paul v. Manitoba Co.*, the court said:

> "As was said in County of Ramsey v. Chicago, Mil. & St. Paul Ry. Co., supra, these charters do not exempt property from taxes but provide a substituted method of taxation based upon the assumption that the property of the companies will be used for railroad purposes and thereby an income be derived the percentage of which received by the state will be the equivalent in its results to taxation of the property."

In *State v. Luther*, supra, the court said:

> "Neither is the question whether there is a grant of immunity from taxation, but whether a commuted system or mode of taxation has been provided. It is a common error in construing statutes like the present, to assume that because the commuted tax is fixed with reference to and is wholly derived from the gross earnings of the road, therefore the lands are exempted from taxation altogether. The percentage of the gross earnings is paid as taxes on both the railroad and the granted lands, and although derived wholly from the former, is a commutation tax alike on both."

In *County of Traverse v. Manitoba Co.*, the court said:

> "It has also been repeatedly held by this court as well as by the Supreme Court of the United

States that the substitution of an assessment upon gross earnings in lieu of all other taxes on the road and the granted lands does not exempt the lands from taxation, but merely substitutes one method of taxation for another upon the terms and conditions specified."

In *State v. Koerner*, the court said:

"It has long been settled by the decisions of this state that the gross earnings tax law was not intended to change the character of the tax but for the purpose of certainty was intended to change the method of computation. *The amount required to be paid still remains a tax upon the railroad property and not against the corporation.* It has often been referred to as 'the commuted tax.'"

In *State v. Telephone Co.*, the court said:

"The gross earnings tax is a system by which the amount of tax upon the property is determined by a method which has generally been found equitable and satisfactory. *It is a tax upon the property and not upon the corporation.*"

(B) THE CONTRACT WAS NOT PERSONAL TO THE MINNESOTA COMPANY, BUT WITH THE RAILROADS AND THE OTHER FRANCHISES, POWERS, PRIVILEGES AND IMMUNITIES GRANTED BY THE CHARTER, WAS TRANSFERABLE TO THE SUCCESSORS OF THAT COMPANY.

First Div. Co. v. Parcher, 14 Minn. 297 (Gil. 224, 252-253).

State v. Railroad Co., 21 Minn. 315, 316-317.

First Div. Co. v. St. Paul, 21 Minn. 526.

Railway Co. v. Pfaender, 23 Minn. 217,223-224.

St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469.

County of Nobles v. Railroad Co., 26 Minn. 294. 298.

State v. Manitoba Co., 30 Minn. 311, 313.

State v. Nor. Pac. Co., 32 Minn. 294, 295.

County of Hennepin v. Manitoba Co., 33 Minn. 534.

County of Ramsey v. Railway Co., 33 Minn. 537.

State v. Nor. Pac. Co., 36 Minn. 207, 209.

County of Stevens v. Manitoba Co., 36 Minn. 467, 470-471.

County of Todd v. Manitoba Co., 38 Minn. 163-164.

St. Paul v. Manitoba Co., 39 Minn. 112.

County of Hennepin v. Manitoba Co., 42 Minn. 238.

County of Traverse v. Manitoba Co., 73 Minn. 417, 424.

Board v. Railroad Co., 49 N. J. Law, 193, 7 Atl. 826, 838-839.

(1) THE STATE OF MINNESOTA, THE ST. PAUL COMPANY, THE FIRST DIVISION COMPANY AND THE MANITOBA COMPANY SUCCESSIVELY ACQUIRED BY TRANSFER ALL THE FRANCHISES AND IMMUNITIES, INCLUDING THE FRANCHISE TO BE A CORPORATION, GRANTED TO THE MINNESOTA COMPANY BY THE ACT OF MAY 22, 1857.

This results from the express provisions of the act of May 22, 1857, and from the general laws of the state.

In *Rochester Railway Co. v. Rochester*, 205 U. S. 236, 248, the court said:

> "But the state, by virtue of the same power which created the original contract of exemption, may, either by the same law or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title."

Section 21 of the act of May 22, 1857, provided:

> "Sec. 21. That said company is hereby authorized and empowered in its corporate capacity to make, execute, issue and deliver its bonds or obligations in any amount which the directors may deem necessary or expedient. * * * And to secure the payment of all or any of said bonds the said company is hereby authorized and empowered, *in its corporate capacity to make, execute and deliver one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches, constructed or authorized to be constructed, and of the estate granted by this act, and any or all other of their estate, real, personal or mixed, in possession or expectancy;* and said company is also hereby authorized and empowered in and by such mortgage or deed of trust to confer upon the trustees or mortgagee full and ample powers to enter into and upon and to take possession, have, use and employ, *or to sell or dispose of the whole or any part of said railroad and branches and all corporate and other franchises, rights and privileges of said company, and in case of any such sale to grant and convey to the party or parties acquiring title under any such sale, and their associates, successors and assigns, all and the same rights, privileges, grants, franchises, immunities and advantages in and by such mortgage or deed of trust enumerated and conveyed which belonged to and were enjoyed by the said company,* as fully and absolutely in every respect as the said company, its stockholders, officers and agents might or

could have done if such sale or foreclosure had not taken place."

Upon the adoption of the constitution of the state in 1858 the contracts and rights created by the charter, including the provisions of section 21 thereof, were, by section 1 of the schedule of the constitution, adopted and continued in force. The charter, then, is recognized in the constitution of the state.

The constitution of the state, in addition to Article IX, sections 1 and 3 hereinbefore quoted, contained the following:

Article IX.

"Sec. 10. The credit of the state shall never be given or loaned in aid of any individual, association or corporation."

Article X.

"Sec. 2. No corporation shall be formed under special act except for municipal purposes."

By an amendment adopted April 15, 1858 (App. p. 1-5), Article IX, Sec. 10, was amended so as to authorize the state to lend its credit for the purpose of aiding the construction of the lines of railway in aid of which Congress had granted lands to the territory. This amendment provided for an issue of state railroad bonds to be issued in aid of the four original land-grant companies of which the Minnesota Company was one (23 Minn. 469, 472-473).

The style of the bonds was fixed by the amend-

ment and the security given by the companies accepting aid was also prescribed. The amendment in this regard provided:

> "Each company shall make provision for the punctual payment and redemption of all bonds issued and delivered as aforesaid, to said company, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this state from any advances of money for that purpose; and as security therefor, the Governor shall demand and receive from each of said companies, before any of said bonds are issued, an instrument pledging the net profits of its road for the payment of said interest, and a conveyance to the state of the first two hundred and forty sections of land, free from prior incumbrances, which such company is or may be authorized to sell, in trust for the better security of the treasury of the state from loss on said bonds, which said deed of trust shall authorize the Governor and Secretary of State to make conveyances of title to all or any of such lands, to purchasers agreeing with the respective railroad companies therefor; * * * and as further security, an amount of first mortgage bonds *on the roads, lands and franchises of the respective companies*, corresponding to the state bonds issued, shall be transferred to the Treasurer of the state at the time of the issue of state bonds, and in case either of said companies shall make default in payment of either the interest or principal of the bonds issued to said companies by the Governor, no more state bonds shall thereafter be issued to said company, and the Governor shall proceed in such manner as may be prescribed by law, to sell the bonds of the defaulting company or companies, or the lands held in trust as above, or may require a foreclosure of the mortgage executed to secure the same."

(App. p. 3-4.)

This amendment remained in effect until the 6th of November, 1860, when it was repealed. (App. p. 5.)

On August 12, 1858, the legislature enacted ch. 72 G. L. 1858 (App. p. 5-9), to carry into effect the provisions of amended section 10 of Article IX of the constitution. This law provided for the issue of state bonds to the land-grant railroad companies, and in section 2 provided that if default should be made in the payment of the principal or interest of the state railroad bonds the Governor should make provision for the payment of the interest and should for that purpose sell a sufficient amount of the bonds of the defaulting company, or sell the lands pledged, or foreclose the mortgage or deed of trust of the defaulting company.

Section 5 of the act provided:

> "All foreclosures of the mortgage or deed of trust of any defaulting company making such default in the payment of interest or principal of the bonds of such company, and for which default a foreclosure of the mortgage or deed of trust of such company may be required or demanded, shall be made only for and on account of the default occurring, and all such foreclosures shall be by public sale of all the properties, rights, privileges and franchises pledged in such deed of trust or mortgage, for the payment of the interest and final redemption of such company's bonds, due notice having first been given of such intended sale by advertisement in such manner and for such length of time as may be prescribed in said deed of trust or mortgage; *and in case of any sale of any railroad or railroads, or any part thereof, constructed or in process of construction by any railroad company, by virtue of any trust*

deed or on foreclosure of any mortgage thereupon, the party or parties acquiring title under any such sale, and their associates, successors or assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter, all and the same rights, privileges, grants, franchises, immunities and advantages in and by said mortgage or deed of trust enumerated and conveyed, which belonged to and were enjoyed by the company making such deed or mortgage or contracting such debts, so far as the same relate and appertain to that portion of said road, or the line thereof mentioned and described in and conveyed by said mortgage or trust deed. * * * *Such purchaser or purchasers, their associates, successors or assigns, may proceed to organize anew and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner provided in the charter of such railroad company, with such changes or variations in manner and form of organization as their altered circumstances and better convenience may seem to require.*"

The act of March 4, 1864, G. L. 1864, c. 55, p. 107, is:

"Whenever any railroad company in this state, or any division of any railroad company, shall have completed their organization pursuant to the laws creating said railroad company or the agreement or agreements under which said division was established, such railroad company or division of such railroad company shall be authorized to file in the office of the Secretary of State of this state a report of its organization, and also in case of the division of an organization a copy of the agreement or agreements under which said division was organized."

Ch. 30, G. L. 1876, provided:

"That in all cases where any railroad corporation of this state, whether created by special act of incorporation or organized under the provisions of this act, or of any legislative enactment of this state or of the late territory of Minnesota, hath heretofore executed, or shall hereafter execute, any mortgage or deed of trust upon the whole or any part of its railroad, division or branch thereof, constructed or authorized to be constructed, with the franchises pertaining to the same, to secure the payment of its corporate bonds, and the road, franchises and property covered by such mortgage or deed of trust, may be foreclosed and sold, in accordance with the provisions of such trust deed and mortgage, for the use and benefit of the holders of such bonds, *the purchaser at such sale, by virtue of such purchase, and the proper certificate thereof or conveyance thereon, shall become vested with all rights, benefits, privileges, property, immunities, franchises and interests so foreclosed and embraced or included in the said mortgage or trust deed and the said sale, which were held at the time of the execution of such mortgage or deed of trust,* or afterwards acquired by the company making such mortgage or deed of trust; and whether the said mortgage or deed of trust and sale shall have included the corporate franchises of such company or not, *the said persons for whose benefit such purchase shall have been made as aforesaid, may organize as hereinafter provided, and from the time of such organization shall be, to all intents and purposes, a corporation, with all and singular the corporate powers, rights, franchises, privileges and immunities which were held at the time of the execution of such mortgage or deed of trust, or afterwards acquired by the company making such mortgage or deed of trust, so far as applicable to the road and property so purchased.* And in the management and opera-

tion of the road or lines, as well as in the use and enjoyment of the property, franchises and interests thus acquired and in the conduct of all business growing out of such purchase, shall be entitled to all and singular the same rights, powers, privileges, immunities and advantages theretofore granted to or bestowed upon the corporation making such mortgage or deed of trust, which were applicable to the road, property and franchises so purchased while held and controlled by the last mentioned corporation, and may have, use and exercise the same in their corporate capacity under and through the organization herein provided for, in like manner, in all respects as the corporation making such mortgage or deed of trust might or could have done, had no foreclosure or sale taken place.

The person or persons so purchasing shall, by themselves or their authorized attorneys or proxies meet within thirty days after the delivery of the conveyance under such sale, or certificate of sale delivered, at some place within this state, of which, and the time of such meeting notice shall be published, by the persons named as purchasers in such deed or certificate of sale, by publication in some of the daily newspapers of St. Paul for at least ten days prior to the time of such meeting, at which time and place the said persons so purchasing shall adopt a corporate name for the proposed new organization, and may proceed without further notice and elect a board of not exceeding nine directors, and such board may thereupon elect a president, secretary, treasurer, and such other officers as the corporation making such mortgage or trust deed may theretofore or prior to such foreclosure have been authorized to elect, and adopt a corporate seal. From the time of such election of officers and the adoption of a corporate seal, the organization shall be deemed complete, and the company thus organized shall become and be a body corporate, under the name so adopted as

aforesaid by the purchasers at the mortgage sale, and clothed as such, with the rights, powers, privileges, franchises, immunities and advantages hereinabove, in such case provided. Subsequent elections of board of directors and other powers and duties of the corporation so organized, shall be had and performed in accordance with the provisions of law in that behalf enacted, prior to such foreclosure, for the government of the corporation making such mortgage or deed of trust, and the same, together with all legislative acts relative to the corporation last mentioned shall continue in force and be applicable to such corporation so organized.

It shall be the duty of such new organization, within thirty days after such organization shall be perfected, to make and certify under its corporate seal, attested by its president and secretary, a statement showing the date of such organization, the corporate name by it adopted, the amount of its capital stock, issued and unissued, common and preferred, the names of its president, secretary, treasurer and other general officers, the number and names of its directors so chosen at said meeting, and cause the same, together with the conveyance or certificate of sale, made to the purchasers upon the foreclosure, to be recorded in the office of the secretary of state, of this state; and such record, or a certified copy of such record of such proceedings, shall be legal evidence of the existence of such corporation or organization."

Ch. 49, G. L. 1879, provided:

"Section 1. That section one (1) of chapter thirty (30) of the General Laws of the state of Minnesota for the year one thousand eight hundred and seventy-six (1876) be and the same is hereby amended by adding thereto the following proviso, viz:

Provided further, that in all cases where

under such foreclosure sale of any railroad, franchises and property, the said railroad, property and franchises shall be purchased at such sale, by any railroad company, heretofore or hereafter duly chartered, organized or incorporated under the laws of this state or of the late territory of Minnesota, that then such railroad company so purchasing shall not be required to comply with the provisions contained in said chapter thirty (30) in regard to organizing as a corporation under such purchase, *but said railroad corporation so purchasing at such sale, shall upon filing in the office of the secretary of state of the conveyance or certificate of sale received by it under such purchase and by virtue thereof, be immediately vested with all and singular the corporate rights, powers, franchises, privileges, immunities and advantages, which were held at the time of the execution of such mortgages or deed of trust, or afterwards acquired by the company making the same and applicable to the railroad and property so purchased, without any further act or ceremony,* and such railroad company so purchasing, shall thereupon and thereafter, in the management and operation of such railroad lines and property so purchased, and in the use and enjoyment thereof, and of the franchises, rights, powers, privileges and immunities thereby acquired, become vested with all and singular the franchises, rights, powers, privileges and immunities theretofore granted to or possessed by the corporation making such mortgage or deed of trust and applicable to the railroad and property so purchased to the same extent and with the like effect as if the same had been originally conferred upon such purchaser."

In 1881 the legislature of Minnesota enacted Chapter 94 of the General Laws of that year (App. p. 11-13), authorizing any railroad company to lease

or purchase or become the owner of or control the stock of any other company, and also authorizing the consolidation of railway companies which did not own or control parallel or competing lines.

Chapter 94 of the laws of 1881 has been carried forward in the Revised Laws of Minnesota 1905, where they appear as sections 2895 to 2898, inclusive (App. pp. 13-16).

Section 2895 is:

> "Any domestic or foreign railroad corporation may lease, purchase or in any way become the owner of any other railroad. * * * (The corporation so leasing or purchasing shall be subject to any law of this state now in force or hereafter enacted relating to *the taxation of the property so leased or purchased*)."

The words within parenthesis were not contained in the law as originally enacted but were inserted by the revision of 1905, which became effective March 1, 1906.

Sections 2896 and 2897 provide for the method of consolidation. Section 2898 provides:

> "Within this state such corporation (the consolidated corporation) *shall succeed to all the rights, powers, franchises, contracts, privileges and immunities and be subject to the same duties, liabilities and obligations in all respects as were granted to or imposed upon the original corporations.*"

First, as to the State, the St. Paul Company and the First Division Company.

The stipulation of facts herein (Trans. pp. 33, 34), states:

> "The Minnesota and Pacific Railroad Company duly accepted said act of May 22, 1857, within the time and in the manner required by section 12 thereof, and began the construction of the lines of railway in said act described. Thereafter and on or about the 31st day of July, 1858, it executed and delivered to Elon Farnsworth and others, as trustees, a mortgage covering the property and rights therein described, which mortgage bore date July 31st, 1858. Thereafter on the 25th day of October, 1858, the said Minnesota and Pacific Railroad Company did execute and deliver to the State of Minnesota an indenture wherein and whereby said Minnesota and Pacific Railroad Company did pledge unto the said State of Minnesota the net earnings or net profits of its said railroad, in compliance with section 10 of Article IX of the Constitution of the State of Minnesota adopted April 18, 1858, and the said Minnesota and Pacific Railroad Company did, on the 23rd day of November, 1858, execute and deliver unto the State of Minnesota a conveyance of the first two hundred and forty sections of land, free from all prior incumbrances, which the said Minnesota and Pacific Railroad Company was authorized to sell; said conveyance being made in the form required by and in compliance with said section 10 of Article IX of the Constitution of the State of Minnesota.
>
> Thereafter, on the 27th day of November, 1858, it executed a supplement to said mortgage to the said Elon Farnsworth and others, which said supplement bore date November 27, 1858. It failed to complete said lines of railway and made default in the conditions of said mortgage and supplement hereinabove described, and thereupon said mortgage was duly fore-

closed by sale at public auction pursuant to advertisement as in said mortgage and supplement provided. Said sale was made on the 23rd day of June, 1860, and at said foreclosure sale the State of Minnesota did purchase the property, franchises, privileges and immunities in said mortgage described. Thereafter on the 8th day of March, 1861, the legislature of the State of Minnesota did enact a law entitled 'An act to facilitate the construction of the Minnesota and Pacific Railroad,' approved March 8 1861. Said Minnesota and Pacific Railroad Company failed to perform the conditions by said act of March 8, 1861, required to be by it performed. Said state did continue thereafter to so own and hold the same, until the 10th day of March, 1862. Upon the 10th day of March, 1862, by an act of the legislature of the State of Minnesota approved that day entitled 'An act to facilitate the construction of the Minnesota and Pacific Railroad and to amend and continue the act of incorporation relating thereto,' all the rights, benefits, immunities, property, franchises and interests of said Minnesota and Pacific Railroad Company so acquired and held by the State of Minnesota as hereinabove stated, were granted and conveyed (insofar as the state could lawfully grant and convey the same) unto Dwight Woodbury and other persons there named, their associates and successors, as a corporation by the name of the St. Paul and Pacific Railroad Company. Said corporation is the same corporation as that hereinabove referred to by said name St. Paul and Pacific Railroad Company. Said St. Paul and Pacific Railroad Company accepted said grant.

In the year 1864, in and by proceedings duly had pursuant to the provisions of a public law of the State of Minnesota entitled 'An act to amend the charter of the St. Paul and Pacific Railroad Company,' approved February 6, 1864, the said First Division of the St. Paul

and Pacific Railroad Company was duly organized and incorporated and became the owner of the lines of railway hereinbefore designated as the Main Line and the Branch Line, and became possessed of and entitled to use, enjoy and exercise, and did use, enjoy and exercise all the rights, benefits, privileges, property, franchises, powers and interests of the Minnesota and Pacific Railroad Company and of the St. Paul and Pacific Railroad Company belonging or pertaining to said Main Line and to said Branch Line so far as the same had been acquired by the said State of Minnesota by virtue of said purchase at said mortgage foreclosure sale and said act of March 8, 1861, and thereafter conveyed and granted by said State of Minnesota to said St. Paul and Pacific Railroad Company.

The organization of the said First Division of the St. Paul and Pacific Railroad Company and its right and title to said lines of railroad, lands, franchises and immunities were duly confirmed (in so far as they could be confirmed) in said company in and by a public act of the State of Minnesota approved February 6, 1866, entitled 'An act to legalize and confirm the organization, acts and proceedings of the First Division of the St. Paul and Pacific Railroad Company and in relation to the charter and powers of said company.' Said First Division of the St. Paul and Pacific Railroad Company duly accepted said act."

In *First Div. Co. v. Parcher*, 14 Minn. 294 (Gil. 224), the court, after reciting the Farnsworth mortgage and the foreclosure thereof (Gil. p. 229), said:

"What did the state acquire by virtue of the foreclosure? The security required by the amendment to the constitution and which is alleged in the complaint to have been given by the Minnesota

and Pacific Railroad Company was a certain amount of the company's bonds secured by a *first mortgage upon its 'roads, lands and franchises.' This language will bear but one construction and that is that the mortgage required and given was a first mortgage upon all the roads, all the lands and all the franchises of the company. This included the corporate franchise or the right to be a corporation. The power to mortgage its corporate franchise was conferred upon the company by the 21st section of its charter,* or if there be any doubt as to this it is clear that it was conferred by the amendment to the constitution, which required and of course authorized all the land-grant companies accepting the state bonds to secure the state by a first mortgage upon all their franchises, as we have before seen. *The State of Minnesota became, then, by virtue of the foreclosure the owner of all the roads, lands and franchises of the Minnesota and Pacific Railroad Company. It was competent for the state to take and hold whatever it acquired by the foreclosure, without merger or extinguishment; to lay down its sovereign character for the occasion and take and hold like a private individual.* This power was plainly conferred upon the state as upon any other purchaser by the acts of August 12, 1858, and of March 6, 1860, before referred to; and independent of these statutes the same principles and same reasons which prevent the merger of an equitable in a legal estate when the two are in the same person and where the intention and interest of such person require them to be kept separate, would permit the state in this instance to acquire and to hold the fruits of the foreclosure, unmerged and unextinguished. * * * That it was the intention of the state to hold what she acquired, without merger, will, we think, sufficiently appear from legislation subsequent to the foreclosure, which we will have occasion to advert to more particularly hereafter, by which she assumed to transfer and assign all

the franchises of the Minnesota and Pacific Railroad Company, including the right to be a corporation. But the title of the state to all the roads, lands and franchises of this company does not rest upon the foreclosure alone."

The court then quotes the act of March 8, 1861, and on page 232, proceeds:

"It will be observed that this release or restoration to the Minnesota and Pacific Railroad Company was conditional. The company accepted it with the conditions attached and upon failure to comply with such conditions and as in itself a further condition the company forfeited to the state, absolutely and without any further act or ceremony all the rights and benefits conferred; and by express provision, and as a consequence agreed to by the acceptance of the act *the state upon such forfeiture* (a forfeiture to be accomplished and perfected by the mere failure of the company to perform, without any necessity for resorting to judicial proceedings to have such forfeiture adjudged or declared) *was to hold and be possessed of all the lands, property and franchises so forfeited, without merger or extinguishment*, to be used, granted or disposed of for the purpose of aiding or facilitating the construction of said road and branches. If, then, anything was wanting in the foreclosure to make perfect the title of the state to all the roads, lands and franchises of the Minnesota and Pacific Company it would seem that such want was amply supplied by the forfeiture under the act of March 8, 1861. *The effect, then, of these laws and proceedings was to vest all the roads, lands and franchises of the Minnesota and Pacific Railroad Company in the State of Minnesota, including the franchise of corporate existence.*"

The court then quotes the act of March 10, 1862, sections 1 and 2, and on page 234, proceeds:

"The language of these sections requires neither comment nor explanation to show what was intended and attempted by the legislature. It is plain that *these sections operated to transfer to the persons named all the roads, lands and franchises of the Minnesota and Pacific Railroad Company which, as we have endeavored to show the state had acquired; and so far there can be no objection taken to the action of the legislature.* But it is urged that the act transcends the power of the legislature because it attempts to form a corporation by special act, in violation of section 2 Article X of our constitution.

Whatever may be the meaning of the constitutional inhibition referred to we are of opinion that it does not forbid such legislation as was had in this instance. *There was no attempt here to create new corporate franchises and thus to form and bring into existence for the first time that which is the very essence of a corporation and without which a corporation is nothing; but corporate franchises already in existence and held by the state as property, without merger, in its general sovereignty and without extinguishment, were transferred to the persons enumerated in the act. This, we think, was a legitimate and constitutional transaction.*"

It is to be borne in mind that the constitutional amendment of April 15, 1858, authorizing the loan of five million dollars to the land-grant companies had been repealed on November 6, 1860, *before the transfer of the franchises, privileges and immunities of the Minnesota and Pacific Company from the state to the St. Paul Company.* Hence the transferability on March 10, 1862, of these franchises and immunities was not due to the amendment.

The court (Gil. pp. 235 to 243) recites the act of February 6, 1864, the Litchfield agreement made pursuant thereto, the act of February 6, 1866 (Trans. pp. 155-166) and the act of March 4, 1864, which we have above referred to, and p. 243, proceeds:

> "This brings us to the question whether, by the arrangement between the St. Paul and Pacific Railroad Company and Litchfield & Co. and E. B. Litchfield, and the acts of the legislature authorizing and approving that arrangement the corporate franchise pertaining to that portion of the line of the St. Paul and Pacific Railroad Company transferred through such arrangement, became vested in E. B. Litchfield and other holders of the special and preferred stock, so that upon their perfecting the organization of the First Division of the St. Paul and Pacific Railroad Company it became a corporation. If so there was brought into existence a corporation separate and distinct from the St. Paul and Pacific Railroad Company. That the territorial legislature in the act incorporating the Minnesota and pacific Railroad Company contemplated that the company might find it necessary or convenient in constructing and operating their road and branches, to make one or more divisions of the road and branches and thus to organize other corporations, is evident."

After reciting section 21 of the act of May 22, 1857, the court, p. 244, proceeds:

> "It is manifest that *the execution and foreclosure of such a mortgage upon a portion of the company's railroad or branches would operate to authorize the organization of a distinct corporation to construct and operate the portion of the road or branch conveyed by the mortgage. The authority to bring into actual existence a distinct corporation by means of a*

mortgage and foreclosure was then given to the company by the act incorporating it. So far the members of the court are agreed. But from this point my brethren reason as follows upon this question in the case: The legislature of the state under the constitution, could not by any special act create nor authorize the creation of a corporation. But the authority to bring into actual operation a separate corporation having been vested by the territorial legislature. whether the state legislature could, without infringing the constitution, empower the company to exercise that authority in a mode different from that contemplated by the original act, is a different question. While the constitution prohibits the vesting of a substantial authority to create a new corporation we do not think that it prohibits the legislature from regulating (of course with the assent of those in whom the authority is vested) the exercise of an authority already vested to bring into actual existence a separate corporate body, and this, we think, is all that the state legislature attempted to do by the acts of February 6, 1864, and February 6, 1866. The company had by its charter authority to bring into actual existence a separate corporation by means of a mortgage or a deed of trust and a sale or foreclosure; that is, by a conditional transfer. We do not think that the legislature transcended its power in consenting to the exercise of this authority by the company through an unconditional transfer. Under the consent of the state legislature the arrangement between the St. Paul and Pacific Railroad Company and E. B. Litchfield and Litchfield & Co. was the exercise of an authority vested by the 21st section of the charter and constituted the transferee, i. e., the holders of the stock, a corporation."

Second, as to the Manitoba Company.

The stipulation of facts states:

"Between 1862 and 1871 the St. Paul and Pacific Railroad Company and the First Division of the St. Paul and Pacific Railroad Company severally executed divers trust deeds and mortgages covering the said Main Line, Branch Line and Extension Line, according to the ownership of the same; each of said mortgages including, covering and conveying, *inter alia* all corporate and other franchises connected with or relating to the said lines of railway, including the franchise to be a corporation, which, at the date of such mortgage was or which might thereafter be possessed or exercised by the company making the same."

(Trans. p. 35. See also pp. 178, 186, 205, 214. 228, 233).

"The said St. Paul, Minneapolis and Manitoba Railway Company is a railway corporation formed and organized by the purchasers of said branch line of railway, at a sale thereof duly made on the 7th day of May, 1879, pursuant to a judgment duly entered in the District Court in and for the County of Ramsey and State of Minnesota, in an action duly instituted to foreclose one of said mortgages covering the said Branch Line, to-wit: A mortgage for $2,800,000 made and executed by the First Division of the St. Paul and Pacific Railroad Company to George L. Becker, Horace Thompson and George T. M. Davis, trustees, which mortgage was dated October 1, 1865. Said sale so made under said mortgage, and the foreclosure thereof was, on the 10th day of June, 1879, duly confirmed by said court. Said purchasers duly met and organized as said St. Paul, Minneapolis and Manitoba Railway Company on the 23rd day of May, 1879, and said company, having thereafter on the 11th day of June, 1879, made, and on the

21st day of June, 1879, filed for record in the office of the Secretary of State, the certificate required by an act approved February 6, 1876, entitled 'An act to amend Title I of Chapter 34 of the General Statutes relating to corporations,' became and since has been and now is a corporation of the State of Minnesota, possessed of all the railways, properties, rights and privileges conferred, conveyed and granted by said mortgage hereinabove in this division VIII described, and by said act of February 7, 1876, and other laws of the State of Minnesota, unless by Exhibit "A" hereto attached, it sold and conveyed the same to the defendant herein. Provided, that the plaintiff, the State of Minnesota, shall not be held to have admitted that the immunity from taxation other than the per centum gross earnings tax was ever lawfully and validly granted to or possessed by any company other than the Minnesota and Pacific Railroad Company."

"Thereafter, in the month of June, 1879, the said St. Paul, Minneapolis and Manitoba Railway Company duly purchased said Main Line and said Branch Line, and certain branches thereof, under decrees duly entered in the District Court in and for the County of Ramsey, State of Minnesota, in a suit instituted to foreclose said mortgages, and purchased and became the owner of said Extension Line with the branches thereof, under a decree of the United States Circuit Court in and for the District of Minnesota, in a suit to foreclose a mortgage thereon made by the St. Paul and Pacific Railroad Company, all of which sales were by said respective courts duly confirmed in the month of June, 1879.

Under and by virtue of said foreclosure proceedings and said sales thereunder, and such purchases by said St. Paul Minneapolis and Manitoba Railway Company, the said St. Paul, Minneapolis and Manitoba Railway Company became the owner of said Main Line, Branch Line and Extension Line described in division

III hereof, including that part of the line from Crookston to East Grand Forks extending from said Crookston to Fisher's Landing, and a branch line extending from Breckenridge to Barnesville, in the State of Minnesota, together with all the rights, privileges, immunities and franchises theretofore granted to or possessed by the corporations hereinbefore in Division VI hereof named, which executed the said mortgages or deeds of trust hreinbefore referred to, and applicable and appurtenant to the railroads and property so purchased at said foreclosure sales, so far as the same were covered and conveyed by said mortgages, and covered and granted to or confirmed in said corporations by the laws aforesaid, or any of them."

(Trans. pp. 35-36. See also pp. 196-202, 224-228, 248-251.)

It is apparent that the St. Paul Company and the First Division Company, by virtue of section 21 of the act of May 22, 1857, the benefits of which they possessed, had power to mortgage and transfer the franchise to be a corporation originally granted to the Minnesota Company; that they did mortgage such franchise; that by the foreclosure of the mortgages and the sales thereunder John S. Barnes and others acquired with the railroads and properties, the franchise to be a corporation and all the other franchises, privileges, advantages, endowments and immunities, including the contract as to taxation; that the purchasers by virtue of the franchise to be a corporation so acquired met and organized under the name The St. Paul, Minneapolis and Manitoba Railway Company. The statement filed by the purchasers (Trans. pp. 200-202)

clearly shows that the organization was effected by virtue of the franchise to be a corporation acquired under the mortgage. This was a valid transaction.

First Div. Co. v. Parcher, *supra*.

The state had acquired by transfer and held this same corporate franchise, unmerged in its sovereignty. The state held as an individual. The state transferred (but did not grant) this same franchise to the St. Paul Company. The St. Paul Company transferred the same franchise in part to the First Division Company. Nothing had happened between the organization of the First Division Company and the foreclosure of the mortgages and the organization of the Manitoba Company to destroy the transferability of the franchise.

When the First Division Company acquired in part the franchise, in order to make a public record of its organization thereunder it complied with the act of March 4, 1864, relating to the registry of railroad organizations. Before the purchase of the franchise by Barnes and his associates, the act of March 4, 1864, had been repealed and the act of March 6, 1876, had been passed. To evidence their organization under the franchise Barnes and his associates filed the statement of organization required by the later act. This did not change the transaction, but merely prescribed a different method of evidencing the transaction.

In *County of Todd v. Manitoba Co.*, 38 Minn. 163, 164, the court said:

"This corporation (the Manitoba Company) became the owner of a part of the line of the Minnesota & Pacific Railroad Company and as to its line of road succeeded to the rights, franchises and immunities of that company, including its exemption from ordinary taxation."

In *County of Hennepin v. Manitoba Co.*, 33 Minn. 534, 535, the court said:

"Laws 1857, Ex. Sess. c. 1, sec. 18, which is a part of respondent's charter, provides that 'the said company shall and will, on or before the first day of March in each year, pay into the treasury of the territory or future state three per centum of the gross earnings of the said railroad for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever. * * * And in consideration of such annual payments the said company shall be forever exempt from all assessments and taxes whatever by the territory or state which shall succeed the territory, or by any county, city, town, village or other municipal authority in the territory or state, upon all stock in the said Minnesota and Pacific Railroad Company, whether belonging to said company or individuals, and upon all its franchises or estates, real, personal or mixed, held by said company.'

The effect of these statutory provisions upon the respondent as respects the land acquired by it on July 5, 1882, is that the right to assess a tax upon the land in specie for that year and to have a lien therefor is superseded by the obligation of respondent to pay the three per cent."

See also:

State v. Railroad Co., 21 Minn. 315.

Railroad Co. v. Georgia, 92 U. S. 665.

(2) THE CONTRACT AS TO TAXATION IS A RIGHT WHICH PASSED BY TRANSFER UNDER THE DESCRIPTION "PROPERTY, FRANCHISES, RIGHTS AND PRIVILEGES."

First Div. Co. v. Parcher, 14 Minn. 297 (Gil. 224, 252, 253).

State v. Railroad Co., 21 Minn. 315, 318.

County of Stevens v. Manitoba Co., 36 Minn. 467, 470-471.

Railroad Co. v. Maryland, 10 How. 376, 394.

Tomlinson v. Branch, 15 Wall. 460.

Humphrey v. Pegues, 16 Wall. 244, 247.

The Delaware Railroad Tax Case, 18 Wall. 206.

Railroad Co. v. Georgia, 92 U. S. 665.

Railroad Co. v. Virginia, 94 U. S. 718.

Green County v. Conness, 109 U. S. 104.

Railroad Co. v. Wright, 116 U. S. 231.

Tennessee v. Whitworth, 117 U. S. 139, 146.

Given v. Wright, 117 U. S. 648.

In *Railway Co. v. Parcher*, the court (Gil. 252, said:

> "It may admit of some doubt whether the rights conferred upon the company in respect to taxation are not franchises in the authorized sense of the term. * * * But if this immunity in regard to taxation be not a franchise in the legitimate meaning of the word it certainly was, as we have already determined, a *right* and a *contract right* to hold the lands exempt from taxation until the same were sold and conveyed. And as it was not a personal and inalienable right, there is no reason why it would not pass with the lands and as *appendant* thereto to the state."

In *County of Stevens v. Manitoba Co.*, the court said:

> "In the Parcher case, supra, the doubt was expressed as to whether the grant of immunity from taxation was a franchise of the Minnesota & Pacific Company which, after resumption by the state had been included as such in the franchises re-conferred upon the St. Paul & Pacific Company. The decision in that case was not put upon that ground, but its correctness has received support from a late decision of the Supreme Court of the United States declaring an immunity from taxation to be a franchise. Given v. Wright, 117 U. S. 648. *We are not disposed to reconsider a question so long settled and so often recognized as settled, in this court;* and will only add that we do not think that the decision in the Parcher case sustaining the exemption in favor of the successors of the Minnesota & Pacific Railroad Co. has been disturbed by the decisions of the Supreme Court of the United States."

The supreme court of Minnesota in 1887 considered it a settled rule of law that the contract provision as to taxation created by the act of May 22, 1857, as modified by later acts, was either a franchise or a contract right which had passed by *transfer* to the St. Paul Company, the First Division Company and the Manitoba Company under the description "property, rights and franchises." At the time the Minnesota court adopted this rule of property the decisions of this Honorable Court were not in conflict.

In the later case of *Rochester Railway Co. v. City of Rochester*, 205 U. S. 236, the earlier decisions of this court upon the subject are reviewed at length

and the rule adopted that an *exemption from taxation* does not pass under the description "rights, privileges and franchises," but does pass under the description "immunities" or "exemptions."

Until the decision of the Rochester Railway case the rule had not been definitely settled in this court. This case, moreover, came before this court on error to the supreme court of New York. The courts of New York had not established as a rule of property that an immunity from taxation or a special contract as to taxation passed under the description "rights, properties and franchises."

See Gunter v. Railroad Co., 200 U. S. 273.

(3) THE CONTRACT AS TO TAXATION OF THE RAILROADS PASSED WITHOUT SPECIFIC ENUMERATION SUCCESSIVELY TO THE ST. PAUL COMPANY, THE FIRST DIVISION COMPANY, THE MANITOBA COMPANY AND THE PLAINTIFF-IN-ERROR BY CONVEYANCE OF THE RAILROADS AND PROPERTY.

The contract as to taxation created a charge upon the railroads and lands, and a right appurtenant to them, which passed by conveyance of the railroads, just as riparian rights pass under a deed of land abutting upon a lake or stream.

In *First Division Co. v. Parcher*, supra, the court (Gil.) p. 252, said:

> "It is further contended that this immunity from taxation was conferred upon the Minnesota and Pacific Railroad Company personally, so to speak, and for its benefit only, and that it

did not pass to the state by the foreclosure and forfeiture. * * *

All the franchises and rights conferred upon the company were granted for the benefit of the company and in that sense were all personal. But we perceive nothing in the language employed in reference to this right, privilege or immunity to distinguish it in this respect from the other rights granted. It would certainly be one of the privileges, grants, franchises, immunities and advantages the sale and transfer of which is authorized by the provisions of section 21 of the original charter of the company.

But if this immunity in regard to taxation be not a franchise in the legitimate meaning of the word, it certainly was, as we have already determined, a right and a contract right to hold the lands exempt from taxation until the same were sold and conveyed, and as it was not a personal and inalienable right *there is no reason why it would not pass with the lands as appendant thereto*, to the state. When the Minnesota and Pacific Railroad Company lost the lands it lost this right, for it had lost that to which the right related. The question, then, is, what became of the right? The state took and held what it had acquired not in its sovereign character but as property like a private individual; and in this capacity it succeeded to the roads, lands and franchises of the company, and in our opinion, to this immunity from taxation as *appendant to the lands*. If this was not the case then this immunity was merged or extinguished. That it was not the intention or interest of the state to suffer it to be merged or extinguished, but to hold and transfer it for the purpose of facilitating and hastening the construction of the road is, we think apparent, for the reasons which we have before advanced for the purpose of showing that the state took, held and transferred the corporate and other franchises of the company unmerged and unextinguished."

On page 254 the court proceeds:

> "The state then, having acquired this immunity from taxation, transferred it with the lands to the St. Paul and Pacific Railroad Company, and thereupon that company became entitled to hold such lands exempt from taxation until the same were sold and conveyed by it. From the views before expressed this consequence follows whether the immunity be regarded as a franchise or as *a right appendant to the lands* and not a franchise. The St. Paul and Pacific Company, thus holding this immunity when the legislation and arrangement were consummated under which the First Division of the St. Paul and Pacific Railroad Company became a corporation and possessed of the lands, franchises and other property, acquired as we have before seen through the same, it acquired this immunity also."

In *Railway Co. v. Pfaender*, supra, the court, p. 223, said:

> "By the terms of the section, as amended, the exemption from assessment and taxation was granted in consideration of the annual payment of the specified per centum of gross earnings, to commence as soon as, and whenever, the requisite amount of railroad was completed and in operation; and the obligation to make this annual payment rested upon the consideration, not only of such exemption, but the grants made to, and the privileges and franchises conferred upon, the company in respect to its entire road or lines of road. The obligation assumed by the state in making the grant, and that of the company in receiving it, to make the required payment in lieu and in full of all assessment and taxation, were, in a certain sense, mutual and reciprocal obligations; and it was obviously the intention of the statute that the grant of immunity from taxation should be treated and regarded as in the na-

ture of a conditional one, charged with the perpetual burden of the annual payment therein provided, and which was to commence whenever and as soon as any portion or portions of the road to which the grant applied, amounting in all to thirty miles, should be completed and put in operation. *As this immunity was not simply a personal privilege conferred upon the original company, but a right appurtenant to its lines of road* (First Div. St. Paul & Pacific R. Co. v. Parcher, 14 Minn. 297, 329, 330), *it follows that the condition thereto annexed always accompanied it as to every part of the road, so that any company, in acquiring any portion thereof, with the franchises and immunities appertaining thereto; took it subject to the condition and burdened with the charge.* It follows, from these views, that the plaintiff company became liable to pay 3 per cent of its yearly gross earnings from and after the expiration of ten years, computed from the time when the first thirty miles of the original lines of road were in fact completed and put in operation. *By what company or companies this was done is a matter of no moment as affects the question under consideration.*"

In *County of Nobles v. Railroad Co.*, 26 Minn. 294, the court, p. 298, said:

"*All the acts of the legislature, from first to last, show it was intended that this exemption should exist in favor of any company which in consideration of the land-grant should assume the construction and maintenance of the line to which it was applicable.* It is so expressed in the act of May 22, 1857, in respect to the Root River Valley & Southern Minnesota Company and in the act of March 4, 1864, in respect to the Minnesota Valley Company; and in the act of 1869, the authority given to the latter company to transfer to the Sioux City & St. Paul Company not the lands merely but

'so much of the line and *land-grant*' implies that the company so authorized might pass to the other all the benefits, together with the burdens of the grant of land made by the state."

In *State v. Manitoba Co.*, 30 Minn. 311, the court, p. 313, said:

"Leasing or selling the railroad cannot affect the rights of the state. Into whose hands soever the railroad may pass and whoever may receive the gross earnings, the obligation to pay and the right of the state to receive, the three per centum on such gross earnings, are unimpaired. Such earnings still furnish the measure of such obligation and right."

In *State v. Northern Pac. Co.*, 32 Minn. 294, 295, the court said:

"In First Div. etc. R. Co. v. Parcher, 14 Minn. 224 (297), it was held that *the exemption from taxation was not a personal privilege conferred on the Minnesota & Pacific Railroad Company, but a right appurtenant to its lines of road; and in Chicago, M. & St. P. Ry. Co. v. Pfaender*, 23 Minn. 217, *that the condition annexed to it (to-wit, the obligation to pay the percentage on gross earnings) always accompanied it as to every part of the road, so that any company in acquiring any portion thereof, with the franchises and immunities appertaining thereto, took it subject to the condition, and burdened with the charge. So that, when the line of road in question here passed to the St. Paul & Pacific Railroad Company then to the First Division of the St. Paul & Pacific Railroad Company, and finally to the St. Paul, Minneapolis & Manitoba Railway Company, each took it with the exemption, and the obligation to pay the percentage. And as the exemption and charge would accompany any part, however small, of the original company's*

lines, it follows that, ordinarily, if any company should acquire any estate or interest in any part of such lines that would give it the right to operate the same as a railroad, and to receive gross earnings from operating it, the company would take and hold such estate or interest exempt from taxation, but subject to the obligation to pay the percentage on the gross earnings received by it."

In *County of Stevens v. Manitoba Co.*, 36 Minn. 467, the court, p. 470, said:

"That the exemption from ordinary taxation created in 1857 in favor of the Minnesota & Pacific Railroad Company subsequently *passed with the lands and as a right appendant thereto* to the St. Paul & Pacific Railroad Company, and to the First Division of the St. Paul and Pacific Railroad Company may now be accepted without question. It was so decided eighteen years ago in the case of the last named company v. Parcher, 14 Minn. 224, (297) which decision has been ever since followed. State v. Winona & St. Peter R. Co., 21 Minn. 315; Minnesota Central Ry. Co. v. Melvin, Id. 339; Chicago, Mil. & St. Paul Ry. Co. v. Pfaender, 23 Minn. 217; City of St. Paul v. St. Paul & Sioux City R. Co. Id. 469, 475; County of Nobles v. Sioux City & St. Paul R. Co., 26 Minn. 294; State v. Northern Pacific R. Co., 32 Minn. 294. In the Parcher case, supra, the doubt was expressed as to whether the granted immunity from taxation was a franchise of the Minnesota & Pacific Company which, after resumption by the state, had been included as such in the franchises reconferred upon the St. Paul & Pacific Company. The decision in that case was not put upon that ground, but its correctness has received support from a late decision of the Supreme Court of the United States declaring an immunity from taxation to be a franchise. Given v. Wright, 117 U. S. 648. We are not

disposed to reconsider a question so long settled and so often recognized as settled in this court; and will only add that we do not think that the decision in the Parcher case sustaining the exemption in favor of the successors of the Minnesota & Pacific Railroad Company has been disturbed by the decisions of the Supreme Court of the United States."

In *County of Todd v. Manitoba Co.*, 38 Minn. 163, the court, p. 164, said:

"This corporation became the owner of a part of the line of the Minnesota & Pacific Railroad Company and as to its line of road succeeded to the rights, franchises and immunities of that company, including its exemption from ordinary taxation. As to this no question is raised; nor that the charter of the Minnesota & Pacific Company is to be referred to as defining the exemption to which the St. Paul, Minneapolis and Manitoba Company is entitled."

In *State v. Luther*, 56 Minn. 156, 161, the court said:

"The decisions of this court cited by counsel on this point lend him no support; for in those cases the property held liable to ordinary taxation was neither granted lands nor property devoted to railroad uses; and in every one of those cases the statute construed extended, in accordance with a uniform legislative policy, the commuted system of taxation to granted lands as well as to railroad property. County of Ramsey v. Chicago, M. & St. P. Ry. Co., 33 Minn. 537; County of Todd v. St. Paul, M. & M. Ry. Co., 38 Minn. 163; State v. Northern Pacific R. Co., 39 Minn. 25."

On page 162 the court said:

"There is nothing in the suggestion that such laws may be held valid as to the taxation

of property devoted to railroad purposes but void as to the taxation of the granted lands.

The provisions of the laws as to taxation must be all valid or all void, and for two reasons: first, the percentage of the gross earnings of the road is a tax on both the road and the lands and not the road alone; and, second, the vice, if there be one, in the commuted system of taxation, would apply to the one class of property as well as the other."

In *County of Traverse v. Manitoba Co.*, 73 Minn. 417, the court, p. 423, said:

"It is a part of the legislative history of Minnesota, both as a territory and a state, that its policy in regard to taxing land-grant roads was adopted with reference alike to facilitating the early construction of these lines of road and to securing to the state what was supposed an ultimate and adequate return for the value of the franchises conferred and which would, in the long run, be the equivalent of the companies' fair share of taxation. The policy adopted was to provide for these companies paying to the state a certain percentage of their gross earnings in lieu of all other taxation on their railroads and also on their granted lands until sold by the company; this latter being (unfortunately, as subsequent experience has proven) without limitation as to time. *The object of this was not to grant a personal favor to the original companies,* but to secure the construction of the lines of road. Hence as might naturally be supposed, *the history of legislation, as well as the decisions of this court, clearly indicate that the general understanding was that this system of taxation was not personal to the original company, but was to be alike applicable to any of their successors which might assume the completion of the road.* The acts of the legislature on the subject, too numerous to be cited, all bear out this assertion.

The decisions of this court from the Parcher case down have all been to the effect that the exemption from ordinary taxation was not simply a personal privilege conferred upon the original company, but was appurtenant to the line of road and existed in favor of any company which, in consideration of the land-grant, should assume the construction and maintenance of the line by which it was applicable; that the immunity as well as the burden passed to any company which acquired the road and assumed its operation and the performance of all the other duties which the original company owed to the public; that the transfer of the road and land-grant to such a company did not constitute a sale of the lands within the meaning of either the act of 1857 or of acts similar to those of 1865 already referred to. First Div. Co. v. Parcher, supra; State v. Winona & St. P. R. Co., 21 Minn. 315; Chicago, M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217; City of St. Paul v. St. P. & S. C. R. Co., 23 Minn. 469; County of Nobles v. Sioux City & St. P. Ry. Co., 26 Minn. 294; State v. St. Paul, M. & M. Ry. Co., 30 Minn. 311; State v. Northern Pacific R. Co., 32 Minn. 294; County of Hennepin v. St. Paul, M. & M. Ry. Co., 33 Minn. 534; County of Ramsey v. Chicago, M. & St. P. Ry. Co., 33 Minn. 537; County of Stevens v. St. Paul, M. & M. Ry. Ry. Co., 36 Minn. 467. * * *

In some of these cases the point decided was that any company owning and operating the road was liable to pay the three per cent gross earnings tax; but the converse of this must be true inasmuch as *this is a tax on the granted lands (until sold) as well as on the railroads; and if the burden is appurtenant to the road so must be the reciprocal benefit, the two being parts of a unit.*"

See also:

State v. Railroad Co., 21 Minn. 315.

First Div. Co. v. St. Paul, 21 Minn. 526.

St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469.

County of Hennepin v. Manitoba Co., 33 Minn. 534.

County of Ramsey v. Railway Co., 33 Minn. 537.

State v. Northern Pac. Co., 36 Minn. 207.

St. Paul v. Manitoba Co., 39 Minn. 112.

County of Hennepin v. Manitoba Co., 42 Minn. 238.

In the case at bar the supreme court of Minnesota (Trans. p. 353), said:

> "A distinction must not be overlooked when considering the assignability of the tax exemption between those imposing a commuted system in lieu of property taxes, and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land is granted to a railroad company to aid in the construction of a railroad and is specifically exempted from taxation until sold by the company, and the company accepts in consideration of the exemption, the exemption attaches to and follows the land. * * * In such case, as we have frequently held, as will be shown later, *the exemption is appurtenant to and passes with the land* to a succeeding corporation assuming the burden attached to it."

By the language above quoted the Minnesota court in this case attempts to sever the contract as to taxation so as to make two contracts instead

of one inseparable contract. It is to be borne in mind that to secure the payment of the tax, the state reserved a lien on both the railroads and the granted lands and that the Minnesota court had already decided in the earlier cases herein cited that the contract as to taxation was a unit and not severable; that it did not create an exemption but a commuted system of taxation of both the railroads and the granted lands.

County of Traverse v. Manitoba Co., supra.
State v. Luther, supra.
County of Todd v. Manitoba Co., supra.
State v. Nor. Pac. Co., 36 Minn. 207.
Railway Co. v. Pfaender, supra.
State v. Nor. Pac. Co., 32 Minn. 294.

But the court below admits that the exemption of the granted lands passes with the lands to any company succeeding to their ownership. In other words, the court has reached the conclusion that an exemption based on no consideration whatever passes to each railway company acquiring the lands, while an exemption based upon a valuable consideration—the payment of a gross earnings tax—does not pass. It is difficult to appreciate the distinction.

The exemption of the railroad is an exemption of the specific property to the same extent that the exemption of the land-grant is an exemption of specific property. At the passage of the act the granted lands had not been specifically described and could not be identified until the railroad was definitely located.

The contract is a unit and creates an exemption from ordinary taxation of both the railroad property and the granted lands in consideration of the payment of a gross earnings tax as provided. The earlier decisions of the supreme court of Minnesota upon this subject are correct. Such has been the uniform construction placed upon the contract provision as to taxation, both by the legislature and by the supreme court of Minnesota until the decision in the pending case.

The contract being a unit is of course inseparable. If it passes to a railway company acquiring the lands, it must also pass with the railroads and lands to any company acquiring both.

The court (Trans. p. 352), said:

> "We have no statute in this state, nor did any exist in territorial days, authorizing, directly or indirectly the mortgaging, sale or other transfer of an exemption of this sort. The charter of the Minnesota and Pacific Company contained no such provision, nor any language which by implication would justify the conclusion that a sale, mortgaging or other transfer of the *privilege* was authorized or even contemplated."

We submit that the court below was in error in making this statement. Section 21 of the charter of the Minnesota and Pacific Company, if it means anything, authorizes the sale and transfer of the contract provision as to taxation. The Minnesota court had previously so held. In addition to this the various statutes herein quoted under this point also authorize the transfer of the contract pro-

vision as to taxation. The statutes as they now exist, namely, sections 2895 and 2898 Revised Laws 1905, authorize a transfer of the provision as to taxation and in fact obligate a lessee or purchaser of a railroad to pay taxes according to the peculiar law relating to the taxation of the specific property purchased or leased.

The language above quoted is significant, however, as indicating that it is still the opinion of the supreme court of Minnesota that the contract provision as to taxation is a privilege and would pass by transfer under the description "privilege."

(4) THE PLAINTIFF-IN-ERROR IS AS LESSEE OF THE MANITOBA COMPANY, ENTITLED TO THE BENEFIT OF THE CONTRACT AS TO TAXATION.

The obligation to pay taxes rests upon the owner rather than the lessee. The burden is shifted to the lessee only by virtue of the covenant in the lease (Trans. p. 83) which requires the plaintiff-in-error to pay as a part of the rental all taxes and assessments upon the property, gross earnings or income of the Manitoba Company.

Vermont & C. R. Co. v. Central Vermont R. Co., 63 Vt. 1, 25; 21 Atl. 262.

Chicago, etc. R. Co. v. Ottumwa, 112 Ia. 300; 83 N. W. 1074.

The instrument executed by the Manitoba Company to the plaintiff-in-error dated February 1, 1890 (Trans. pp. 44-96) is a lease and not a conveyance.

County of Traverse v. Railway Co., 73 Minn. 417.

Morrison v. Railway Co., 63 Minn. 75.

But whether the instrument in question be a lease or a conveyance is immaterial. The plaintiff-in-error in either case is taxable only in accordance with the act of May 22, 1857, as amended by the acts of March 2 and 4, 1865.

Railway Co. v. Pfaender, 23 Minn. 217.

State v. Manitoba Co., 30 Minn. 311.

State v. Northern Pac. Co., 32 Minn. 294.

State v. Northern Pac. Co., 36 Minn. 207

County of Traverse v. Manitoba Co., 73 Minn. 417.

Railway Co. v. Koerner, 85 Minn. 149.

That such is the settled rule of law in Minnesota is evident from the provision inserted in sec. 1, ch. 94, G. L. 1881, in 1905 by the revision of that year (Sec. 2895, Rev. Laws 1905), as follows:

> "The corporation so leasing or purchasing shall be subject to any law of this state now in force or hereafter enacted relating to the taxation of the property so leased or purchased."

This provision purports to make the purchasing or leasing company subject to the provisions as to taxation contained in any special law peculiarly applicable to the property leased or purchased. This provision was enacted in 1905 and became effective March 1, 1906, long after the adoption of the constitutional amendment of 1871. At the date of this enactment as well as at the date of

the adoption of the constitutional amendment, it was the settled law in Minnesota that the taxation of each railroad was governed by the special law applicable to it.

Railway Co. v. Koerner, 85 Minn. 149.

The provision above quoted was never submitted to or approved by a vote of the people. Therefore, it is ineffective to change the basis of taxation of any particular railroad property. The legislature must have intended by this act only to bind the purchasers or lessees to pay taxes in accordance with the special laws applicable to each particular property. Such is in accord with the uniform decisions of the supreme court of Minnesota until the decision in the case at bar.

(C) NEITHER THE TRANSFERABILITY OF THE CONTRACT AS TO TAXATION NOR THE CAPACITY OF THE ST. PAUL COMPANY, THE FIRST DIVISION COMPANY, THE MANITOBA COMPANY AND THE PLAINTIFF-IN-ERROR TO ACQUIRE THE CONTRACT HAS BEEN DESTROYED BY THE CONSTITUTION OF THE STATE OF MINNESOTA.

(1) SUCH WAS THE SETTLED RULE OF LAW IN MINNESOTA UNTIL THE DECISION IN THE PRESENT CASE. THE RULE WAS AN ESTABLISHED RULE OF PROPERTY.

So far as relates to this question the Minnesota constitution has at all times since November 6, 1860, been precisely the same as it is today except for the amendment of 1871.

The amendment adopted April 15, 1858, was repealed November 6, 1860. The constitution of

Minnesota as it has existed since November 6, 1860, did not make it impossible for the state to transfer to the St. Paul Company by the act of March 10, 1862, the franchises and immunities of the Minnesota Company which had been acquired by the state under the foreclosure of the Farnsworth mortgage and the act March 8, 1861. Nor did it prevent the St. Paul Company from transferring in part the franchises and immunities, including the franchise to be a corporation to the First Division Company.

First Div. Co. v. Parcher, supra.

State v. Railroad Co., 21 Minn. 315.

St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469.

County of Stevens v. Manitoba Co., 36 Minn. 467.

County of Traverse v. Manitoba Co., 73 Minn. 417.

Therefore, at the time of the purchase of the railroads by Barnes and his associates, who organized as the Manitoba Company, the transferability of the franchises and immunities originally granted by the act of May 22, 1857, continued, unless it had been destroyed by the amendment adopted November 8, 1871.

It would seem clear that the amendment in question does not affect the situation. The amendment is:

> "Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted which provides that any railroad company now existing in this state or operating its road therein * * * shall in

> lieu of other taxes and assessments upon their real estate, roads, rolling stock and other personal property * * * pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of such railroad company * * * shall, before the same shall take effect and be in force, be submitted to a vote of the people of the state and be adopted and ratified by a majority of the electors voting at the election at which the same shall be submitted to them."

This amendment simply provides that before any law repealing or amending a gross earnings tax law shall become effective it must be voted upon by the people and adopted by a majority vote. It does not provide that when adopted by a majority vote the law shall become effective to modify or abrogate existing valid contracts.

Each of the mortgages under which the Manitoba Company acquired the railroads had been executed prior to the adoption of the amendment. A valid contract could no more be impaired nor property be taken without compensation by a constitutional amendment or a law adopted by a majority vote of the people than by a mere enactment of the legislature.

Gunn v. Barry, 15 Wall. 610, 623.
State v. Young, 29 Minn. 474, 550.

Section 21 of the act of May 22, 1857, made the franchises, immunities and privileges conferred by the act transferable by mortgage. The right to transfer is a valuable property right. The right to transfer given by section 21 could not be taken away either by law or by constitutional provision subsequently enacted. The constitutional amend-

ment of 1871, therefore, cannot operate to destroy the transferability of the contract as to taxation created by section 18 of the act.

Dartmouth College v. Woodward, 4 Wheat. 518, 652.

Planter's Bank v. Sharp, 6 How. 301, 321.

Walker v. Whitehead, 16 Wall. 314.

Railway Co. v. Texas, 170 U. S. 243, 256, ff.

Gunn v. Barry, supra.

State v. Young, supra.

The sole object of the amendment was to restrict the power of the legislature in the matter of amending or repealing gross earnings tax laws.

State v. Luther, supra.

The amendment placed no restriction on the power of the legislature to enact gross earnings tax laws additional to those prescribed by Art. IX, Secs. 1 and 3, other than to require that acts repealing or amending such laws be approved by a majority vote of the people. It can not be read into contracts, made prior to its adoption.

In *New Jersey v. Yard*, 95 U. S. 104, 116, this court said:

> "Can it be believed that it was intended by either party to this contract that, after it was signed by both parties, one was bound forever, and the other only for a day? That it was intended to be a part of the contract that the State of New Jersey was, at her option, to be bound or not? That there was implied in it, when it was offered to the acceptance of the company, the right on the part of the legislature to alter or amend it at pleasure? If the state intended to reserve

> this right, what necessity for asking the company to accept in such formal manner the terms of a contract which the State could at any time make to suit itself?"

The amendment of 1871 had been adopted before the decision of the Minnesota court in *State v. Rail road Co.*, 21 Minn. 315, and was in full force and effect at the date of that and all subsequent decisions upon the subject of gross earnings taxation. Notwithstanding this amendment it was consistently held that the contract as to taxation passed to and became binding upon the Manitoba Company and other companies acquiring any of the lines authorized by the charter of the Minnesota Company.

Railway Co. v. Pfaender, supra.
State v. Nor. Pac. Co., 32 Minn. 294.
State v. Nor. Pac. Co., 36 Minn. 207.
County of Stevens v. Manitoba Co., supra.
County of Traverse v. Manitoba Co., supra.

In the absence of any change in the constitution of the state the same rule should apply in the case at bar as has been applied in all the earlier cases with reference to the transferability of the provisions of the act of May 22, 1857, relating to the taxation of railroads.

The Minnesota court (Trans. p. 353), said:

> "But where, as in the case at bar, specific land is granted to a railroad company to aid in the construction of a railroad and is specifically exempted from taxation until sold by the company, and the company accepts in consideration of the exemption, the exemption attaches to and follows the land. * * * In such

> case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it."

The court, therefore, in the pending case, admits that it has frequently heretofore held and it still holds, that the exemption of the granted lands from taxation pases, notwithstanding the constitutional provisions, to each railway company successively acquiring the railroads and lands. If the constitution did not destroy the transferability of the contract or the exemption and accompanying charge as to the granted lands, how can it destroy the transferability of the contract or exemption and charge as to the railroads? The contract is a unit and inseparable. If it passes as to the lands it must pass in its entirety both as to the lands and as to the railroad. So far as the provisions of the constitution are concerned there can be no distinction between the two.

State v. Luther, 56 Minn. 156, 162.

The act of Congress granting the lands did not require the state to exempt them from taxation in the hands of the companies to whom the state should grant them. Therefore, the exemption of the lands does not rest upon any contract between the state and the Federal government.

(2) THE DECISIONS OF THIS COURT RELIED ON BY THE STATE AND FOLLOWED BY THE COURT BELOW ARE NOT CONTROLLING ON THE QUESTIONS HERE INVOLVED.

It is peculiarly the province of the state courts to determine the rules of property within the

state. Hence the Minnesota decisions, though at variance with many decisions of this and other courts, are controlling on the questions here presented.

Nichols v. Levy, 5. Wall. 433, 444.

Bucher v. Railway Co., 125 U. S. 555, 582.

Powers v. Railway Co., 201 U. S. 543, 556.

The Minnesota Court in its earlier decisions had declined to adopt the rule enunciated in the decisions of this court.

State v. Railroad Co., 21 Minn. 315, 318.

County of Stevens v. Manitoba Co., 36 Minn. 467, 471.

County of Traverse v. Manitoba Co., 73 Minn. 417. 423, 426.

In *State v. Railroad Co.*, the court said:

> "In reference to the case of Trask v. Maguire, 18 Wall. 391, we think it may be distinguished in some important respects from the case at bar; but if it be in point, we should not deem it our duty to recede from or overrule the views expressed in the *Parcher Case*, upon its authority."

In *County of Stevens v. Manitoba Co.*, the court said:

> "We are not disposed to reconsider a question so long settled, and so often recognized as settled, in this court; and will only add that we do not think that the decision in the *Parcher Case*, sustaining the exemption in favor of the successors of the Minnesota & Pacific Railroad Company, has been disturbed by the decisions of the Supreme Court of the United States."

In *County of Traverse v. Manitoba Co.*, the court, p. 423, said:

> "But the chief contention of the state is that this immunity of its road, lands, etc., from the ordinary form of taxation, was not a franchise or attached to the property, but a mere personal privilege to the First Division Company, which could not be transferred, by mortgage or otherwise, to any other company. *And counsel has cited numerous authorities from other jurisdictions, and particularly from the supreme court of the United States, as supporting his contention. But we have in this state a body of law commencing over 40 years ago, made up of the acts of the legislature, the practical construction of these acts by the executive department of the government, and the judicial construction of them by our courts, which must control the decision of this question as applied to these old territorial 'land-grant' railroad companies, without reference to the general doctrine or the decisions in other jurisdictions on the subject.*"

Again, p. 426:

> "*Whatever errors of law, if any, may be involved in the practical or judicial construction of either constitution or statutes on the subject of the taxation of 'land-grant' lands of the old territorial railroad companies or their successors, after that construction has been adopted and acted upon by all departments of the government, and generally acquiesced in for so many years, it must now be adhered to. It is now too late to think of undoing the past.* All these years the defendant has been paying, and the state accepting, taxes on these lands in the substituted or commuted form of a percentage on the gross earnings of the road."

It is to be borne in mind that by the settled construction adopted by the legislature and the

courts of Minnesota the contract as to taxation, the corporate franchise and all the other franchises, privileges and immunities granted by the act of May 22, 1857, constituted private property, alienable in the same way as is any other property; that upon a transfer of the franchises, including the franchise to be a corporation, a new set of stockholders succeeded to the old; that the new stockholders constituted a corporation by virtue of the franchise acquired from their predecessors.

The Minnesota court had. prior to its decision in the case at bar, repudiated the theory that the franchises and immunities of the Minnesota Company had been resumed by the state as a sovereign, and regranted. That court had held that even the state acquired the franchises and immunities from the Minnesota Company by transfer as an individual and not by resumption as a sovereign, and that the state as an individual transferred (but did not as a sovereign grant) the franchises and immunities to the St. Paul Company.

Neither plaintiff-in-error, the Manitoba Company, the First Division Company nor the St. Paul Company came into existence by virtue of a sovereign grant of corporate franchises made after the adoption of the Minnesota constitution.

The Manitoba Company, the First Division Company and the St. Paul Company came into existence by virtue of corporate franchises granted by the territory of Minnesota to the Minnesota Company in 1857 and transferred successively to several associations of individuals who organized as the St.

Paul Company, the First Division Company and the Manitoba Company respectively. Neither of these transfers involved a resumption of the franchise by the state.

Plaintiff-in-error exists as a corporation by virtue of a franchise granted by the territory of Minnesota by an act entitled "An act to incorporate the Minneapolis and St. Cloud Railroad Company," approved March 1, 1856 (Trans. pp. 315-323).

Therefore the capacity of each of the companies to acquire the contract as to taxation is not affected by constitutional provisions which enter into and become part of the corporate franchises granted after the adoption of the state constitution.

There has been no consolidation of companies as in the case of Gardner v. M. & St. L. Ry. Co., 73 Minn. 517, s. c. 177 U. S. 332, *and State v. Chicago Great Western Ry. Co.*, 106 Minn. 290.

There has been a division and a reunion or merger of corporations. In cases of merger franchises and immunities pass by transfer and not by sovereign grant. Constitutional provisions do not enter into the merger or prevent the acquisition by the absorbing company of the franchises and immunities of the merged companies.

State v. Railroad Co., 45 Md. 361.

See also:

Tomlinson v. Branch, 15 Wall. 460.
Charleston v. Branch, 15 Wall. 470.
Branch v. Charleston, 92 U. S. 677.

These matters distinguish the Minnesota decisions from the decisions of this and other courts.

In *Trask v. Maguire*, 18 Wall. 391, the facts were: The railways and property of the St. Louis and Iron Mountain Railroad Company, incorporated March 3, 1851, were forever exempt from taxation. The state made a loan of bonds to the company, the bonds to be secured by a mortgage. Default being made, the mortgage was foreclosed and the state purchased the railways franchises, immunities and properties. In 1867 the state regranted the properties, franchises and immunities to certain persons, who, upon July 26, 1867, organized the St. Louis and Iron Mountain Railroad Company. Prior to this conveyance by the state and prior to the organization of the second company and on March 4, 1865, the constitution of Missouri had been amended so as to provide that no property, real or personal, should be exempt from taxation except such as may be exclusively used for public schools, etc. This court held that upon the purchase of the railroad and properties by the state the exemption from taxation became merged in the sovereignty of the state and ceased; that by virtue of the constitutional amendment of 1865 the state was incompetent in 1867 to renew or regrant this immunity from taxation.

The decision of this court was in accord with the decisions of the supreme court of Missouri. The courts of Missouri had adopted the rule that upon consolidation of a corporation, or upon forfeiture of their property and franchises, the state resumed the same in its sovereign capacity and not as an individual. This being the case any regrant of

the franchises and immunities was subject to the constitutional provision in force at the date of the regrant. The rule adopted by the Missouri courts and sustained and followed by this court was very different from the rule which has been adopted and consistently followed for a long period by the Minnesota court.

In *Shields v. Ohio*, 95 U. S. 319, there had been a consolidation of two railroad companies each of which enjoyed certain special privileges and immunities. Prior to the consolidation the constitution of the state had been adopted, which provided that no special privilege or immunity should ever be granted that might not be altered, revoked or repealed by the general assembly. This court affirmed the holding of the supreme court of Ohio that upon the consolidation of the companies all the franchises and immunities were resumed by the state in its sovereign capacity and regranted to the consolidated company; that this regrant was subject to the constitutional provision at the time in force and that the regrant of the franchises and immunities was subject to the right to amend, repeal or revoke them.

This was in harmony with the established law of Ohio as previously declared by its courts.

In *Railroad Co. v. Maine*, 96 U. S. 499, two corporations enjoying special contract provisions as to taxation were consolidated. At the time of the consolidation there was in force a general statute which provided that the charters of companies

should at all times be liable to be altered, amended or repealed. This court affirmed the holding of the supreme court of Maine that by the consolidation the state had resumed the franchises and privileges of the two companies as of the date of the consolidation and that the provisions of the general statute referred to entered into and became a part of the regrant; that the special provisions as to taxation were therefore subject to alteration, amendment and repeal.

This decision was in harmony with the settled law of Maine. The courts of Maine had not established a contrary doctrine.

In *Railroad Co. v. Georgia*, 98 U. S. 359, there had been a consolidation of two companies each possessing an exemption from taxation. The consolidation took effect after January 1, 1863. By an act of the Georgia legislature adopted January 1, 1863, it was provided that the charters of private corporations were subject to be changed, modified or destroyed at the will of the legislature and that in all cases where private charters should thereafter be granted the state reserved the right to withdraw the franchise. This court affirmed the holding of the supreme court of Georgia that by the consolidation the two original companies were dissolved and a new company created by sovereign grant as of the date of the consolidation; that the act previously referred to entered into the charter of the new company.

This was in harmony with the law of Georgia as declared by its courts.

In *Railroad Co. v. Palmes*, 109 U. S. 244, a railroad company possessing an exemption from taxation had mortgaged its railroad, together with its corporate and all its other franchises and immunities. The mortgage was foreclosed and the railroads and all the rights, privileges and franchises thereof were sold and conveyed on August 7, 1872, to A. E. Maxwell, and by Maxwell were sold and conveyed on December 10, 1872, to the Pensacola & Louisville Railroad Company, a corporation created by the laws of Florida. The original act incorporating the last named company was passed July 16, 1868, but the company was reorganized under an amendatory act which took effect February 4, 1872. The Pensacola Railroad Company was organized in 1877 under the laws of Florida and in 1878 purchased under foreclosure proceedings the railways, franchises, privileges and immunities of the Pensacola & Louisville Company. Before these acts were passed the constitution of the state of Florida went into effect in 1868 and provided that the legislature should provide for a uniform and equal rate of taxation and that the property of all corporations should be subject to taxation. The court held that the grants made to the Pensacola & Louisville Company by the acts of 1872 and by a later act of 1877, though in form a renewal or transfer of previously existing grants, were in fact the creation of new ones; that is, that the state first resumed the franchises, immunities and privileges and then regranted them; that the constitution of 1868 applied and prevented the

regrant of the immunity from taxation; that the Pensacola Company created in 1877 was by the constitution rendered incapable of taking the exemption from taxation.

It was claimed in this case that the supreme court of Florida, whose decision was then under review, had previously laid down a contrary rule, in the case of *Gonzales v. Sullivan*, 16 Fla. 791. This court held that the case of *Gonzales v. Sullivan*, did not consider or pass upon the capacity of the Pensacola & Louisville Railroad Company to accept the privilege and benefit of the exemption attempted to be conferred by the acts of 1872 and 1877. The court of Florida had not established a rule of property contrary to the rule adopted in the case then before this court.

Other cases involving similar questions and in which the decisions of this court were similar are the following:

Railroad Co. v. Commissioners, 112 U. S. 609, on error to the supreme court of Arkansas.

Railroad Co. v. Berry, 113 U. S. 465, on error to the supreme court of Arkansas.

Railroad Co. v. Miller, 114 U. S. 176, on error to the supreme court of West Virginia.

Railroad Co. v. Missouri, 152 U. S. 301, on error to the supreme court of Missouri.

Bank v. Tennessee, 161 U. S. 186, on error to the supreme court of Tennessee.

Railroad Co. v. Adams, 180 U. S. 1, on error to the supreme court of Mississippi.

Railroad Co. v. Hewes, 183 U. S. 66, on error to the supreme court of Mississippi.

Railroad Co. v. Maryland, 187 U. S. 258, on error to the supreme court of Maryland.

Traction Co. v. Algelt, 200 U. S. 304, on error to the supreme court of Texas.

Railway Co. v. Rochester, 205 U. S. 236, on error to the supreme court of New York.

Railroad Co. v. Vicksburg, 209 U. S. 358, on appeal from the Circuit Court of the United States for the Southern District of Mississippi.

In the cases above referred to the state courts whose decisions were under review had adopted the doctrine which this court in those cases approved. In none of the cases had the state courts by a long line of decisions adopted a contrary rule of property.

A merger as distinguished from a technical consolidation does not work a dissolution of the constituent companies, nor create a new corporation. Whether this result is brought about depends upon the statutes of the state under which the transaction takes effect.

Railroad Co. v. Georgia, 92 U. S. 665.

State v. Railroad Co., 45 Md. 361.

In *Railroad Co. v. Georgia*, it was held that a union of two companies did not create a new corporation and the property of each of the original companies was entitled after the union to the same exemption as it was entitled to before the consolidation.

V.

THE CONTENTIONS THAT THE ACT OF MAY 22, 1857, AND THE AMENDATORY ACTS CREATED A VALID CONTRACT WHICH PASSED BY TRANSFER TO THE SUCCESSORS OF THE MINNESOTA COMPANY AND VESTED IN THE MANITOBA COMPANY AND PLAINTIFF-IN-ERROR AS AN APPURTENANT TO THE LINES OF RAILROAD, ARE RES ADJUDICATA IN FAVOR OF THE PLAINTIFF-IN-ERROR.

On the trial of the cause in the District Court of Ramsey County, the plaintiff-in-error introduced in evidence the judgment roll in the case of *First Division Co. v. Parcher*, and also the opinion of the supreme court in that case, pursuant to which the judgment was entered in the district court of Wright county (Defendant's Exhibits 34 and 35, Trans. pp. 252-278).

Plaintiff-in-error also introduced in evidence the record in the lower court and in the supreme court of Minnesota in the case of *County of Stevens v. Manitoba Co.* (Defendant's Exhibit 36, Trans. pp. 280-290), and also the record in the lower court and in the supreme court of Minnesota in the case of *County of Traverse v. Manitoba Co.* (Defendant's Exhibit 37, Trans. p. 291-315).

In printing the record there were omitted from the transcript the opinions of the supreme court of Minnesota in each of these cases, and a note inserted stating that the opinions as introduced in evidence were as they appear in the printed reports, 14 Minn. 297 (Gil. 224); 36 Minn. 467; and 73 Minn. 417.

(1) WHILE THE STATE WAS NOT UNDER ITS OWN NAME A PARTY TO THE RECORD IN EITHER OF THE CASES MENTIONED, IT WAS IN FACT A PARTY IN INTEREST.

Under the laws of Minnesota the county auditors and county treasurers are the agents of the state for the purpose of collecting ordinary taxes for state purposes and were acting as such agents in the proceedings out of which the litigation in the three cases we have referred to arose. We think the state will not deny this proposition, but in order that it may be clear to the court we quote below the statutes.

The statutes in force at the time of the institution of First Division Co. v. Parcher, were the following:

Statutes of 1866, ch. 11:

> "Sec. 54. Each county auditor, after receiving from the auditor of state, and such officers and authorities as are legally empowered to determine the rates or amounts of taxes to be levied for the various purposes authorized by law, statements of the rates and sums to be levied for the current year, shall forthwith proceed to determine the sums to be levied upon each tract or lot of real property, adding the taxes of any previous year that may have been omitted, and upon the amount of personal property, moneys and credits, listed in his county, in the name of each person, which shall be assessed equally on all real and personal property subject to such taxes, and set down in one or more columns, in such manner and form as the auditor of state prescribes; and in all cases where the whole amount of taxes upon personal property, moneys and credits of any person shall not amount to ten cents, the audi-

tor shall not enter the same upon the duplicate, if such person has no other taxable property."

"Sec. 60. The county auditor shall apportion to their several funds the amount of moneys received from the sale of lands and town lots forfeited to the state for the nonpayment of taxes, after deducting the expenses of sale, distributing said amount to the several funds for which said taxes were originally levied, and the county treasurer shall apply them accordingly, and shall receive two per centum on all moneys by him received, as provided in this section."

"Sec. 68. Whenever a civil action is commenced against any person holding the office of county treasurer or county auditor, or other county office, for performing or attempting to perform, any duty authorized or directed by any statute of this state for the collection of the public revenue, such treasurer, auditor or other officer shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending such action, and the amount of any damages and costs adjudged against him; which said fees, expenses, damages and costs shall be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected, and by the said auditor shall be deducted from the shares or portions of revenue at any time payable to each, including as one of said parties the state itself, as well as the counties, townships cities, villages, school districts and organizations, entitled as aforesaid."

"Sec. 86. The county treasurer shall be the collector of all taxes assessed upon the duplicate in his county, whether assessed for state, county, city, town, township, school, poor, bridge, road or other purposes, anything in the charter of the city of St. Paul or in the charter of any town, or in any other act of the legislature heretofore passed to the contrary notwithstanding, and also of all fines, forfeitures or penalties received by any person or officer for

the use of his county, and he shall proceed to collect the same according to law, and place the same when collected to the credit of the county. But this provision shall not be so construed as to include any fines or penalties accruing to any municipal corporation for the violation of its ordinances, and which was recovered before any city justice. Each county treasurer may appoint one or more deputies to assist him in the collection of taxes and may take such bond and security from the person so appointed as he deems necessary for his indemnity, and shall in all cases be liable and accountable for the proceedings and misconduct of his deputies in office."

"Sec. 119. County auditors shall cause the list of delinquent lands in their respective counties to be published at least three weeks between the third Monday of March and the third Monday of May in each year, in some newspaper printed and published in their respective counties, the publisher of which shall agree to do the same at a price not exceeding the rates allowed by law, if any such is published therein, and if there is none such, then in some such newspaper printed and published at the capital of the state. To which list there shall be attached a notice, that the whole of the several tracts or town lots in said list contained, or so much thereof as shall be necessary to pay the taxes, penalty, and expenses charged thereon, will be sold at the court house in such county, or in case there is no court house, at such other place as may be determined upon by the county commissioners of said county, on the first Monday in June next thereafter, or on any subsequent day to which such sale may be lawfully adjourned by the county treasurer, unless such taxes, penalty and expenses are paid before that time."

"Sec. 120. The county auditor shall, on or before the day of sale mentioned in such notice, insert at the foot of the record of the delinquent list, a copy of such notice, and shall, also,

certify on said record, immediately following such notice, the name of the paper and the length of time such list and notice were published therein.

"Sec. 121. Immediately before advertising such list of delinquent land and lots, the county auditor shall compare the same with the duplicate in the hands of the county treasurer, and strike therefrom all lands or town lots upon which the taxes, penalty and costs of the preceding year, with the taxes of the current year, have been paid, and proceed to advertise the remainder as herein prescribed."

"Sec. 122. The county treasurer or his deputy shall attend at the court house or at some other convenient place at the county seat of his county, on the first Monday in June, and shall then and there, at and after the hour of ten in the forenoon, proceed to offer for sale at public auction, separately, each tract of land or town lot contained in the advertisement aforesaid, and on which the taxes, penalty and costs have not been paid; and the person offering at said sale to pay the taxes, penalty and costs charged on such land or lot, for the least quantity thereof, shall be the purchaser of such quantity."

The laws in force at the time of the institution of *County of Stevens v. Manitoba Co.* and *County of Traverse v. Manitoba Co.* were the following:

General Statues 1878, Chap. 11:

"Sec. 48. All taxes shall be levied or voted in specific amounts, and the rates per centum shall be determined from the amount of property, as equalized by the state board of equalization each year, except such general taxes as may be definitely fixed by law. The state tax shall be levied by the legislature, and the rate of such tax shall be certified by the auditor of state to each county auditor on or before the first day of October, annually. The county

taxes shall be levied by the county commissioners at the time of their meeting in July of each year. Such taxes shall be based upon an itemized statement of the county expenses for the ensuing year, which statement shall be included in the published proceedings of the said board, and no greater levy of county tax shall be made upon the taxable property of any county than will be equal to the amount of such expenses, with an excess of five per cent. of the same. The taxes voted by incorporated cities, villages, townships and school districts shall be certified by the proper authorities to the county auditor on or before the tenth day of October in each year. The rate per centum of all taxes, except the state tax and such other taxes, the rates of which may be fixed by law, shall be calculated and fixed by the county auditor according to the limitations hereinafter prescribed: Provided, that if any county, city, town, or school district shall return a greater amount than the prescribed rates will raise, then the county auditor shall only extend such amount of tax as the limited rate will produce."

"Sec. 53. The county auditor shall deliver the lists of the several districts of the county to the county treasurer on or before the first day of December in each year, taking his receipt therefor, showing the total amount of taxes due upon the said lists; and such lists shall be full and sufficient authority for the county treasurer to receive and collect taxes therein levied."

"Sec. 54. The county treasurer shall be the receiver and collector of all the taxes extended upon the tax list of the county, whether levied for state, county, city, town, school, poor, bridge, road or other purposes, anything in the charter of any city or town, or in any other act of the legislature heretofore passed, to the contrary notwithstanding; and also of all fines, forfeitures or penalties received by any person or officer for the use of his county; and he shall proceed to collect the same according to law,

and place the same, when collected, to the credit of the proper funds; but this provision shall not be so construed as to include any fines and penalties accruing to any municipal corporation for the violation of its ordinances, and which were recovered before any city justice."

"Sec. 67. The county auditor shall keep accounts with the state, county and with each township, city, incorporated village and school district in the county, and immediately after each settlement with the county treasurer, he shall credit the collections to the proper funds; and upon application of any town, city, village or school district treasurer, the auditor shall give him an order on the county treasurer for the amount due such township, city, village or school district, and shall charge them respectively with the amount of such order; provided, that the person so applying for such order shall deposit with the auditor a certificate from the clerk of the township, city, village or school district, stating that such person is treasurer of such township, city, village, or school district, duly elected or appointed, and that he has given bond according to law."

"Sec. 69. On the first day of June of each year, the county treasurer shall return to the county auditor the several tax lists in his hands, having compared the same with his duplicate receipts on file in the auditor's office, and written opposite the amount of each tax so receipted for the word "paid," and the number of the treasurer's receipt given in discharge of such tax; and each tract or lot of real property against which the taxes remain unpaid shall be deemed delinquent. And thereupon a penalty of ten per cent. shall immediately accrue, and thereafter be charged, upon all such delinquent taxes; and any auditor who shall make out and deliver any statement of delinquent taxes, without including such penalty therein, and any treasurer who shall receive payment of such tax without including such penalty shall be liable to the county for the amount of such penalty."

"Sec. 70. On or before the fifteenth day of June the county auditor shall file in the office of the clerk of the district court of the county, or, if it be attached for judicial purposes to some other county, then in the office of the clerk of such court in that county, a list of the delinquent taxes upon real estate within his county, which list shall contain a description of each piece or parcel of land on which such taxes shall be so delinquent, with the name of the owner, if known, and if unknown, so stated, appearing on the delinquent list, and the amount of tax delinquent and penalty for each year opposite such description, and shall verify such list by his affidavit that the same is a correct list of taxes delinquent, for the year or years therein appearing, upon real estate in said county. The filing of such list shall have the force and effect of filing a complaint in an action by the county against each piece or parcel of land therein described, to enforce payment of the taxes and penalties therein appearing against it, and shall be deemed the institution of such action; and the same shall operate as notice of the pendency of such action."

"Sec. 75. Any person, company, or corporation, having any estate, right, title or interest in, or lien upon, any piece or parcel of land embraced in said list as published, may, within twenty days after the last publication of said notice, file in the office of the clerk an answer, verified as pleadings in civil actions, setting forth his defense or objection to the tax or penalty against such piece or parcel of land, which answer need not be in any particular form, but shall clearly refer to the piece or parcel of land intended and set forth, in ordinary and concise language, the facts constituting the defense or objection to such tax or penalty; and if the list shall embrace the taxes for two or more years, the defense or objections may be to the taxes or penalty for one or more of such years."

"Sec. 77. If answers shall be filed within the time hereinbefore prescribed as to the taxes or penalties upon any pieces or parcels of land embraced in said list as published, such answers shall stand for trial at any general term of the district court in the county where such proceedings are pending, in session at the time when the time to file answers as aforesaid shall expire, or at the next general or special term appointed to be held in said county; and if no general or special term shall be appointed to be held within thirty days thereafter, then the same shall be brought to trial at any general term appointed to be held within the judicial district, upon ten days' notice. It shall be the duty of the county attorney of the county in which said taxes are levied, if there be one, and if there be none, then of the county in which such proceedings are instituted, to take charge of and prosecute such proceedings; but the county commissioners of the county in which such taxes are levied may employ any other attorney to assist such county attorney therein. At the term at which such proceedings come on for trial, they shall take precedence of all other business before the court. The court shall proceed without delay, and summarily hear and determine the objections or defenses made by the several answers, and shall dispose of all such answers, and direct judgment accordingly, at the same term, and in the trial thereof shall disregard all technicalities and matters of form not affecting the substantial merits."

"Sec. 80. The judgment which the court shall render shall be final, except that, upon application of the county or other party against whom the court shall have decided the point raised by any defense or objection, the court may, if in its opinion the point is of great public importance or likely to arise frequently, make a brief statement of the facts established bearing on the point, and of its decision, and forthwith transmit the same to the clerk of the

supreme court, who shall enter the same as a cause pending in said court, and place the same on the term calendar of said court for the term then in session, or for the first term thereafter; and the same shall be entitled to a preference over all other business before said court, and shall be decided by said court at the term for which it shall be entered in the calendar. As soon as it shall be decided, the clerk of the supreme court shall enter the proper order, and forthwith transmit a certified copy of such order to the clerk of the proper district court; Provided, that such proceeding shall in no case prevent the entry of judgment in the district court, nor prevent the sale of any piece or parcel of land pursuant to the judgment of the district court, unless at the time of applying for such statement, an undertaking with at least two sureties, and in an amount to be approved by the judge of the district court, conditioned for the payment of the amount for which judgment shall be rendered in the district court, and the penalties and costs allowed by law, if the decision of the district court shall be affirmed, shall be filed with the clerk of the district court; Provided further, that the court wherein such judgment is entered shall have power in its discretion, and for good cause shown by any person interested, to open or vacate such judgment at any time before the expiration of the period of redemption, and may allow a defense to be interposed in such case upon the grounds that the tax in question has been paid or that the property in question was not subject to taxation, to the same extent as such defense might have been interposed before entry of such judgment, but upon no other grounds. Application to vacate or open such judgment may be summary upon such notice to the purchaser and county auditor of the proper county as the court may direct, and, in case a defense is allowed to be interposed, the case shall proceed in all respects as in defended cases under this act."

Under these provisions of the statute it is clear that the state was represented in the three cases referred to by its especially designated and authorized agents, and is bound by the judgments therein:

Gunter v. Railroad Co., 200 U. S. 273, 284-287.
People v. Holladay, 29 Pac. 54, 56.
Railroad Co. v. County, 48 Atl. 853, 855.
State v. Kennedy, 83 N. W. 87, 88.

(2) PLAINTIFF-IN-ERROR IS THE SUCCESSOR IN INTEREST AND PRIVY IN ESTATE OF THE MANITOBA COMPANY, THE FIRST DIVISION COMPANY, THE ST. PAUL COMPANY AND THE MINNESOTA COMPANY, AND IS ENTITLED TO THE BENEFIT OF THE JUDGMENTS IN THE CASES REFERRED TO.

The railways, properties, franchises, privileges and immunities have passed successively from the one company to the other. The Parcher case, the Stevens county case and the County of Traverse case each involved property rights—an appurtenant to the railroads and the lands. The judgments, therefore, are conclusive on the questions involved, and the matters are *res adjudicata* in favor of the plaintiff-in-error.

Gunter v. Railroad Co., 200 U. S. 273, 289, 292.
Baldwin v. Maryland, 179 U. S. 220, 221.
Stone v. Bank, 174 U. S. 409, 412.
Railway Co. v. United States, 168 U. S. 1, 48.
New Orleans v. Bank, 167 U. S. 371, 396.
Bank v. Frankfort, 191 U. S. 499, 512.
Kurtz v. Railway Co., 61 Minn. 18, 24.
People v. Beaudry, 27 Pac. 610, 612.
People v. Irrigation District, 61 Pac. 86, 88.

People v. Holladay, 29 Pac. 54, 56.
Railway Co. v. Nelson, 100 N. W. 1033.
Banking Co. v. Wright, 132 Fed. 912, 915.
Railroad Co. v. County, 48 Atl. 853, 855.
Grunert v. Spalding, 78 N. W. 606, 613.
State v. Kennedy, 83 N. W. 87, 88.

In *Baldwin v. Maryland*, this court said:

"The controversy in the case reported in 85 Md. 145, was one between the estate of the ward and the state of Maryland. In that case the right of the state to compel a payment by the estate of the ward of taxes levied thereon for the years 1893 and 1894 was settled. The personality of the litigants, the form of the action, do not disturb the substantial fact that the controversy was between the estate of the ward and the state of Maryland, and that that controversy was determined in favor of the state. This court declining to disturb the final judgment of the court of appeals of the state of Maryland that controversy is settled and beyond further litigation. The matter has become res judicata between the estate and the state. There is no pretence that the taxes of 1895 stand in any other condition as to matter of fact than the taxes of 1893 and 1894 which were in terms included within the litigation settled by the decision referred to. The ruling, therefore, as to the taxes for 1895 comes within the force of that decision and is determined by the conclusion in respect to the taxes of 1893 and 1894."

In *Railway Co. v. United States*, this court said:

"The general principle announced in numerous cases is that a right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies.

And even if the second suit is for a different cause of action the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if as between parties and their privies conclusiveness did not attend the judgments of such tribunals in respect to all matters properly put in issue and actually determined by them."

Again on page 54 the court said:

"It is also said that the decision in the former cases concluded at most only the question of title in respect of the lands there in controversy. This cannot be correct when the land in both suits have a common source of title and the title depends upon the existence or non-existence of the same fact or facts."

In *New Orleans v. Bank*, this court said:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore res judicata cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases but exists even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or

their privies. This is the elemental rule stated in the text boks and enforced by many decisions of this court."

Again at page 398:

"It follows then that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if in the prior cases the question of exemption was necessarily presented and determined upon indentically the same facts upon which the right of exemption is now claimed."

In *Bank v. Frankfort*, the court said:

"Again it is urged that the taxes herein involved are those for different years than were under consideration and covered by the decree of the Federal court relied upon. The vice of this argument consists in assuming that the taxes for specific years were alone involved and covered by the decree of the court. The controversy was as to the force and effect of the Hewitt law as a contract, not for one year but for all years; not for one assessment but for all assessments of taxes upon certain property of the bank. The contest was over the contract and the consequent want of power to collect any and all taxes the assessment of which did violence to the contract rights of the bank. The court had jurisdiction of the parties and of the subject matter of the suit, and it was adjudicated that there was a contract which was entitled to protection against impairment by state legislation within the right guaranteed by the Federal constitution. This adjudication necessarily included not only the taxes for specific years, but foreclosed the right to collect any taxes concerning which the contract afforded immunity to the bank. That a bank charter and laws having the effect of bank charters may constitute valid and bind-

> ing contracts conclusive between the parties is now so well settled by the adjudications of this court as not to be open to discussion. New Orleans v. Citizens Bank, 167 U. S. 371. In that case it was held that a judgment of the district court of New Orleans holding the charter of a bank to constitute a binding and conclusive contract between the parties, although involving the taxes of other years than those in suit, was res judicata and conclusive between the parties."

In *Kurtz v. Railway Co.*, the court said:

> "It is true as claimed by counsel for the respondents, that as a general rule a judgment binds only parties and privies. The rule, however, has no application to this case, for all judgments whatever, are conclusive proof, against all the world, of the existence of that state of things which they actually affect; and they are relevant when their own existence or the existence of things so affected is a fact in issue or relevant to the issue."

It is clear from the cases above cited that the fact that there are involved in this case taxes for a year other than those involved in the *Parcher case*, the *County of Stevens case* and the *County of Traverse case*, does not affect the question. The right to the exemption from ordinary taxation in consideration of the payment of gross earnings tax was decided in each of the earlier cases in favor of the railway company. The law and the facts on which this exemption in consideration of the gross earnings tax rests are the same as at the date of the earlier decisions.

(3) THE QUESTIONS WERE IN ISSUE AND WERE DECIDED IN THE THREE CASES REFERRED TO.

In the *Parcher case* the complaint alleged the act of May 22, 1857, and the organization of the Minnesota Company thereunder; the execution of the Farnsworth mortgage and the foreclosure of that mortgage and the purchase of the railroads, franchises, rights and privileges by the state; the passage of the act of March 8, 1861, and the forfeiture to the state under that act. It also alleged the passage of the act of March 10, 1862, by which the state transferred the lands, railroads, rights, privileges and franchises to the St. Paul Company; the act of February 6, 1864; the Litchfield agreement and the act of February 6, 1866, approving that agreement; the filing and recording of the agreement as required by the act of March 4, 1864. It also alleged the levy of taxes upon certain of the granted lands claimed to be owned by the First Division Company and the threat of Parcher, the county treasurer, and Kreis, the county auditor, to sell the lands for taxes, and asked for an injunction. The defendants demurred to the complaint upon the grounds, first, that the First Division Company had no legal capacity to sue as it was not a corporation, and that it was neither a natural nor artificial person, and also on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The lower court overruled the demurrer and the defendants appealed to the supreme court. The decision of the supreme court appears at 14 Minn.

297 (Gil. 224). In this case the supreme court decided that the act of May 22, 1857, as amended, created an irrepealable contract as to the taxation of the railroads and lands contemplated by the act; that the Minnesota and Pacific Company had power by its charter in section 21 thereof, to mortgage all its rights, privileges and franchises, including its franchise to be a corporation; that by the foreclosure of the Farnworth mortgage and by the forfeiture provided for in the act of March 8, 1861, all the franchises and immunities of the Minnesota Company passed to the State of Minnesota; that it was competent for the State to take and the State did take and hold the railroads, lands, franchises and immunities, including the corporate franchises, without merger or extinguishment, as a private person; that the state afterwards transferred to Woodbury and others, as a corporation by the name the St. Paul Company, the railroads, lands, franchises and immunities, including the right to be a corporation, such transfer being effected by the act of March 10, 1862; that the act of March 10, 1862, was a valid enactment and that upon the organization by the persons named in the act of the St. Paul Company that company became possessed of all the railroads, lands, franchises and immunities, including the franchise to be a corporation, of the Minnesota Company; that the organization of the First Division Company was legal and effective to create a new corporation in view of section 21 of the act of May 22, 1857; that the exemption of the granted lands and rail-

roads from taxation survived and passed from the Minnesota Company to the St. Paul Company and from the St. Paul Company to the First Division Company.

The *County of Stevens case* was a proceeding on the part of the county officers to secure judgment for taxes for the year 1885 against certain lands included in the land-grant. In this case it was adjudged that the exemption from ordinary taxation created by the act of May 22, 1857, as amended by the acts of March, 1865, survived and passed from the original grantees thereof through the St. Paul Company and the First Division Company to the Manitoba Company and that such exemption in consideration of the payment of gross earnings tax as in the acts provided was a valid and subsisting contract right.

The *County of Traverse* case involved a similar question and a like conclusion was reached. It was also adjudged in the Traverse county case that the instrument executed February 1, 1890, by the Manitoba Company to the plaintiff-in-error was not a sale, but a lease.

It is true that in these cases the question involved was whether the granted lands were exempt from ordinary taxation under the provisions of the act of May 22, 1857, as amended by the acts of March, 1865. This necessarily involved the questions whether the acts created a valid, irrepealable contract and whether this contract had descended to and vested in the Manitoba Company; and of course as incidental to these questions whether un-

der the constitution of the state it could descend and be transferred.

In the cases it was adjudged that a contract existed as to the taxation of both the railroads and the lands; that it was not an exemption but a commuted form of taxation; that the contract was a unit and that it had passed to the Manitoba Company so that the lands were exempt.

If, then, the exemption from ordinary taxation is an entirety, a unit, inseparable, if it passed as to the lands it must have passed as to the railroad. So far as the constitutional objections are concerned an exemption is an exemption, whether it be of the granted lands or of the railroads, and if the constitution permitted the passing of one it certainly permitted the passing of the other.

The court below admits (Trans. p. 353), that the exemption or contract passed as to the lands. There is no ground on which a distinction can be made so as to hold that it did not pass as to the railroads.

State v. Luther, 56 Minn. 156, 162.

(4) THE JUDGMENTS ARE CONCLUSIVE AS EVIDENCE BECAUSE IF PLEADED THEY WOULD BE A BAR.

To secure the benefit of the prior adjudication, it need not be pleaded. It may be introduced in evidence, if material and is conclusive of the issue.

Thompson v. Roberts, 24 How. 233.

Nichols v. Levy, 5 Wall. 433, 442-443.

Gunter v. Railroad Co., 200 U. S. 273.

The supreme court of Minnesota seems to have thought the question here discussed one not of *res adjudicata*, but of *stare decisis* (Trans. p. 357, ff.).

The question is not one of *stare decisis* at all. In order to invoke the rule of *stare decisis* it is not necessary to introduce as evidence the records and decisions in prior cases. For the purpose of showing what a court has previously declared to be the law reference may be made to its prior decisions without the necessity of introducing those decisions in evidence or making them a part of the record in the case. Plaintiff-in-error in the court below expressly relied upon the decisions and records in the three cases we have referred to as *res adjudicata* and as conclusive evidence of the matters covered by them. This is evident from the brief and argument in the Minnesota supreme court on behalf of the plaintiff-in-error (106 Minn. 313, 332), and we think this statement will not be controverted by counsel for the state.

The Minnesota court (Trans. p. 349), said:

> "We approach with some embarrassment the consideration of the questions presented owing to the expressions found in prior opinions in cases involving railroad taxation, which seem to, and which defendant's counsel earnestly insist, fully determine the questions involved in the present case adversely to the contentions of the state. But in view of the fact, which will be demonstrated further along in the opinion, that the question here presented, viz., whether the provisions of the Minnesota and Pacific Company's charter on the subject of the earnings tax constituted an irrevocable

> contract, was not involved in any prior litigation between the sate and the railroad company and what was said in the previous cases bearing upon the question was wholly unnecessary to the decision of the particular case, and therefore not of binding force or effect, we take up and dispose of the present case as though the question were, as it is, here for the first time."

This language seems to admit that if the Minnesota court had ever held the gross earnings provision to be a contract, the cases relied on would be decisive. There can be no question as to the existence of the contract, whether the Minnesota court has so decided or not. How can the failure of the court to decide a fact obvious from and assumed in its decisions, destroy the effect of those decisions as *res adjudicata* on the points actually decided?

Even if the cases are binding only on the principle of *stare decisis* it would seem that they should be followed.

The long continued practical construction of a statute by the judicial, legislative and executive departments of the government is entitled to great weight, particularly where titles have been acquired on the faith of the construction.

McCullough v. Maryland, 4 Wheat. 316.

United States v. Railroad Co., 98 U. S. 334, 341.

Brown v. United States, 113 U. S. 568, 570.

United States v. Hill, 120 U. S. 169, 180.

Knowlton v. Moore, 178 U. S. 41.

Carson v. Smith, 5 Minn. 78 (Gil. 58).

Loring v. Benedict, 15 Minn. 198 (Gil. 153).
Faribault v. Misener, 20 Minn. 396 (Gil. 347).
Ames v. Railroad Co., 21 Minn. 241.
Green v. Boom Co., 35 Minn. 155, 161.
Willis v. Mabon, 48 Minn. 140.
State v. Moffet, 64 Minn. 292.
State v. Railway Co., 95 Minn. 43.
State v. Evans, 99 Minn. 220.

In the Minnesota supreme court the state claimed that *County of Stevens v. Manitoba Co.* and *County of Traverse v. Manitoba Co.* were not *res adjudicata* because in those cases the court was foreclosed by stipulation.

The stipulation in these cases was to the effect that the Manitoba Company became the owner of all the railroads, property, granted lands and all rights, franchises, privileges, immunities and exemptions at any time possessed by the mortgagor companies (St. Paul Company and First Division Company)or either of them in so far as such rights, privileges, immunities and exemptions could be legally mortgaged, assigned or conveyed by said companies or either of them or acquired by purchase at such mortgage forclosure or otherwise (36 Minn. 469-470; 73 Minn. 422). The stipulation in these cases amounted to nothing more than the stipulation of facts in the case at bar.

In the case at bar (Trans. p. 36), it is stipulated:

> "Under and by virtue of said foreclosure proceedings and said sales thereunder and such purchases by said St. Paul, Minneapolis and

Manitoba Railway Company the said St. Paul, Minneapolis and Manitoba Railway Company became the owner of said Main Line, Branch Line and Extension Line described in division III hereof, including that part of the line from Crookston to East Grand Forks extending from said Crookston to Fisher's Landing, and a branch line extending from Breckenridge to Barnesville, in the state of Minnesota, together with all the rights, privileges, immunities and franchises theretofore granted to or possessed by the corporation hereinbefore in division VI hereof named, which executed the said mortgages or deeds of trust hereinbefore referred to, and applicable and appurtenant to the railroads and properties so purchased at said foreclosure sales so far as the same were covered and conveyed by said mortgages and covered, granted to or confirmed in said corporations by the laws aforesaid, or any of them."

The stipulation in the case of *County of Stevens v. Manitoba Co.; County of Traverse v. Manitoba Co.*, and the case at bar left to be determined as a question of law whether the franchises and immunities, including the exemption from taxation, passed or could under the constitution pass from one company to its succesor in interest.

If it were impossible under the law and constitution that the exemption from taxation pass from a preceding to a succeeding owner the court was not in any wise bound by the stipulation.

Railroad Co. v. Palmes, 109 U. S. 244, 253.

Ritchie v. McMullen, 159 U. S. 235.

Heron v. Manitoba Co., 68 Minn. 542, 547.

In *Heron v. Manitoba Co.*, p. 547, the court said:

"The allegation that it was the duty of the St. Paul, Minneapolis and Manitoba Railway Company to keep the right of way free from grass, leaves and other combustible material and see that the engines run over the road were properly constructed, kept in repair and carefully handled is a mere conclusion of law, based evidently upon the assumption that the duty continued notwithstanding its lease and surrender of possession and control of the road to the Great Northern Railway Company. The allegation that it was the duty of the Great Northern Railway Company to see that all engines run over the road were in safe condition and properly handled is, as to engines operated by the Eastern Railway Company, also a mere conclusion of law, based on the assumption that such duties still rest upon it, notwithstanding its agreement with that company and irrespective of any personal negligence of its own, for none is alleged; there being no allegation that the Great Northern Railway Company had any knowledge that the engine of the Eastern Railway Company was in a defective and unsafe condition or was being negligently handled."

VI.

THE BENEFITS OF THE CONTRACT AS TO TAXATION HAVE NOT BEEN LOST OR WAIVED BY ANY OF THE PARTIES IN INTEREST.

In the court below it was claimed that plaintiff-in-error had waived its right to the benefits of the contract as to taxation because it had become the lessee not only of the lines of the Manitoba Company for a term of nine hundred and ninety-nine years from February 1, 1890, but also a lessee of the lines of the Eastern Railway Company of Minnesota for a term of ninety-nine years from the first day of May, 1902. The claim was further based upon the fact that beginning in the year 1883 or shortly thereafter the Manitoba Company extended its lines into other states westwardly of Minnesota. The Minnesota court did not pass on the question.

At the time of the acquisition of the railways by the Manitoba Company the only railways constructed were located wholly within the state of Minnesota, and were the Main Line from St. Paul to Breckenridge, the Branch Line from East Minneapolis to Watab and the Extension Line from East St. Cloud to St. Vincent, and two partially completed branch lines.

In 1883 the Manitoba Company began the construction of its line into the state of North Dakota and other states westwardly of Minnesota. At all times since the extension of its lines into

states other than Minnesota the Manitoba Company and its successor in interest have kept an accurate account of the earnings of the lines within Minnesota and of the earnings of the Manitoba lines as distinguished from lines built by other companies and leased to plaintiff-in-error upon the following basis: The gross earnings derived from demurrage, switching, storage, wharfage and dockage, depot privileges, weighing, elevators and similar matters strictly local to any lines were credited as local earnings within the state of the respective lines in and upon which the same were earned. The gross earnings on the transportation of each passenger and upon each shipment of freight and upon each other item of traffic transported and conducted partly over the lines or any of them within the state of Minnesota and partly over the extensions thereof in other states, were apportioned and credited as gross earnings from the operation of the lines respectively in Minnesota in the proportion which the number of miles of the lines in Minnesota over which the passenger or shipment of freight or other item of tariff was carried, transported or conducted, bore to the total number of miles of its railways both within and without the state of Minnesota over which the same item was carried, transported or conducted. A division was made between each of the lines of the Manitoba Company in Minnesota and between the lines built by other companies and operated by the plaintiff-in-error on the same basis (Trans. pp. 36-38).

During the year 1905 the gross earnings of the

lines of railway involved in this proceeding was the sum of $12,073,738.25 and was derived from the operation of the lines of the Manitoba Company as follows:

From business and traffic local to and transacted over the Main Line from St. Paul to Breckenridge, the sum of $5,386,016.90.

From business and traffic local to and transacted over the Branch and Extension lines, the sum of $3,459,126.96.

The earnings from all the other lines of the Manitoba Company amounted to $3,228,594.39 (Trans. p. 41).

(1) THE BASIS OF DIVISION IS THE CORRECT ONE AND THE ONE ENFORCED BY THE STATE.

A division of interestate earnings and the apportionment thereof to the lines of railway in Minnesota and the apportionment of earnings within Minnesota between the lines of railway of the Manitoba Company and the lines of other companies operated by plaintiff-in-error made in the manner above stated was at all times in strict accordance with the requirements made, given and enforced by the Railroad and Warehouse Commission of the State of Minnesota and the treasurer and other officers of said state upon whom was devolved the duty of ascertaining the amount of gross earnings derived by railway companies from the operation of railways within the state of Minnesota, and particularly the gross earnings derived by the Manitoba Company and plaintiff-in-error from the oper-

ation of the railways described (Trans. pp. 28-31), and with the duty of collecting taxes due to the state of Minnesota upon such gross earnings; and said officers of the state of Minnesota at all times insisted that for the purpose of determining and ascertaining the gross earnings derived by the Manitoba Company and plaintiff-in-error from the operation of the lines of the Manitoba Company within the state of Minnesota, the interstate earnings should be apportioned and credited to the lines in Minnesota in the manner and upon the basis above stated, and said basis and manner have been so enforced by the said officers of the state of Minnesota for more than twenty years last past (Trans. p. 39). Ch. 235, G. L. 1889 (App. p. 18-20) made the same requirement as to division of earnings between lines within and without the state. The same requirement is again made in Ch. 253, G. L. 1903, Sec. 2 (App. p. 20-21).

In the case at bar the state adopts the basis above described and sues for an additional one per cent of the earnings, determined on this basis, of the lines within Minnesota.

The division of earnings between Minnesota and other states has been made in accordance with the requirements of Minnesota. The state cannot object to the division on the same basis of earnings between the different lines within the state.

In *Kansas v. Colorado*, 206 U. S. 46, there was involved a controversy between the two states with reference to the diversion of the waters of the

Arkansas river. The supreme court of Kansas had recognized the right to reasonable diversion of waters for irrigation purposes as a common law right. Colorado had enacted a statute authorizing the reasonable appropriation of water. Kansas sought to prevent this appropriation under the Colorado statute on the ground that the people of Kansas had a right to a continuous flow of the waters of the Arkansas river as that flow existed without any human interference therewith. This court, p. 104-105, said:

> "As Kansas thus recognizes the right of appropriating the waters of a stream for the purpose of irrigation subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered between herself and a sister state."

The mileage basis was the basis of division always adopted and enforced by the state. The basis was adopted in

Railway Co. v. Pfaender, 23 Minn. 217.
State v. Nor. Pac. Co., 32 Minn. 294.
State v. Nor. Pac. Co., 36 Minn. 207.
Railroad Co. v. Koerner, 85 Minn. 149.

(2) THERE HAS BEEN NO MERGER OF THE MANITOBA LINES WITH THE LINES OF OTHER COMPANIES SO AS TO WAIVE THE BENEFITS OF THE CONTRACT.

The lease from the Manitoba Company to the plaintiff-in-error was dated February 1, 1890 and ths for a term of nine hundred and ninety-nine tors (Trans. p. 44 ff.). The lease from the East-

ern Railway Company of Minnesota to the plaintiff-in-error is dated May 1, 1902, and runs for a term of ninety-nine years (Trans. p. 29).

The Great Northern Company took the lease of the lines of the Eastern Company long after it had acquired by lease the lines of the Manitoba Company. The Manitoba Company still retains a reversionary interest in the railroads, with the rights, privileges and immunities pertaining thereto (Trans. pp. 91 ff.). Its lessee, plaintiff-in-error, cannot destroy the rights and franchises of the Manitoba Company, even if it attempted to do so.

Even if the instrument dated February 1, 1890 were an absolute sale and transfer rather than a lease, no merger would result so as to destroy or waive the contract as to taxation.

Railway Co. v. Pfaender, 23 Minn. 217.
State v. Manitoba Co., 30 Minn., 311, 313.
State v. Nor. Pac. Co., 32 Minn. 294-5.
State v .Nor. Pac. Co., 36 Minn. 207.
State v. Depot Co., 42 Minn. 142.
Railroad Co. v. Koerner, 85 Minn. 149, 152.

In *State v. Northern Pacific Co.*, 32 Minn. 294, it appeared, p. 299, that the Northern Pacific had a line of railway extending across the northern part of the state of Minnesota and connecting with the lines of the Manitoba Company at Watab. The Northern Pacific lines were taxable under the act of February 3, 1865. It had acquired from the Manitoba Company the right to run its trains over the lines of that company from Watab to St. Paul.

The Northern Pacific Company was held obligated to pay taxes upon its earnings from the use of the Manitoba lines in accordance with the contract contained in the act of May 22, 1857, as amended by later acts. Its obligation to pay taxes upon its other lines in Minnesota was based upon the act of February 3, 1865. The rate of taxation as to the two sets of lines was different. The earnings of the Northern Pacific Company by means of its use of the Manitoba lines described in the opinion were determined by apportioning the earnings to the Manitoba lines on a mileage basis, as above stated.

In *Railway Co. v. Pfaender*, the Milwaukee Company was the owner of lines other than the line from St. Paul to Winona and from Winona to La Crescent authorized by the acts of May 22, 1857 and March 2, 1865, respectively. The taxation of the line from St. Paul to Winona and from Winona to La Crescent was governed by the special provisions of the Minnesota Company's charter. The taxation of its other lines was governed by other laws and was at a different rate. The apportionment of earnings between the lines was made on the mileage basis, as above stated.

In *State v. Northern Pacific Co.*, 36 Minn. 207, it appeared that the Northern Pacific owned a line extending across the north part of the state taxable under the act of February 3, 1865. It had become the owner of a line from Brainerd to Watab which the St. Paul Company had been authorized to construct under the act of March 6, 1863 and which was

taxable in accordance with the act of May 22, 1857 as amended. It was also the lessee of a line constructed by the Western Railroad Company, extending from Watab to Minneapolis, taxable under Chapter 111 Special Laws 1873. The supreme court held that the earnings of the line from Watab to Brainerd was taxable at the rate of three per cent and of the line from Watab to St. Paul at the rate of one per cent. The earnings were apportioned to the two lines on a mileage basis in the manner hereinbefore described.

In *Railway Co. v. Koerner*, 85 Minn. 149, the facts were that the Minneapolis and St. Louis Railway Company, a company taxable at the rate of three per cent, had purchased and acquired the railway of the Minneapolis, New Ulm & Southwestern Company, a company taxable at the rate of one per cent. The state claimed that by the acquisition of the latter road the Minneapolis and St. Louis Company had merged it into its system and that the earnings of the acquired road should be included in the earnings of the Minneapolis & St. Louis Company and taxed at the rate of three per cent. The court, p. 150, said.

> "Under the law of this state appellant is required to pay a tax of three per cent on its gross earnings, and the state insists that the purchase of the New Ulm and Southwestern operated as a merger of that road into appellant's system and that the earnings of the purchased road are to be estimated in making up the amount of the gross earnings of the purchaser. These acts have been construed ad-

versely to the state's position in State v. Northern Pacific R. Co., 36 Minn. 207."

Again, on page 151:

> "It is immaterial to the state whether such new roads continue to be operated under a lease or by a purchaser or whether they continue to be owned and operated by the original corporation. The act contains no express prohibition to a sale and transfer of such railroads to companies already subject to the three per cent gross earnings tax, and there is no language from which it can be implied. If it be conceded that a merger arises where roads paying a one per cent tax are sold to a company paying a three per cent tax, the converse must be equally true and a merger occurs when the road paying a three per cent tax is sold to a company paying a one per cent tax. The statutes are not capable of any such construction and our conclusion is that no change has been effected in the rate of taxation on the gross earnings of the Minneapolis, New Ulm & Southwestern road from the fact that it has been purchased and is now operated by appellant."

The state in its brief relied largely on the case of *Maine Central v. Maine*, 96 U. S. 499. The case in question is by no means controlling because: First, the matter we are discussing is one of local law, to be determined by the decisions of the state court. Second, because in the Maine Central case the provision of the charter relating to the exemption required that an accurate account be kept of the *net* earnings, which involved an account not only of the gross earnings, but of the operating expenses of each company. The act of March 2, 1865 requires the St. Paul Company and its successors to keep only an account of the *gross* earnings.

In the *Maine Central case* there had been a consolidation which under the laws of Maine involved a resumption by the state of the franchises and immunities and a re-grant subject to the laws in force at the time of the re-grant.

(3) IF ACCOUNTS HAD NOT BEEN SEPARATELY KEPT OF THE EARNINGS OF THE LINES OF THE MANITOBA COMPANY AND OF THE LINES OF THE EASTERN COMPANY THE EARNINGS WOULD BE TAXABLE ONLY AT THE RATE OF THREE PER CENT.

The Eastern Railway Company of Minnesota and plaintiff-in-error are corporations both organized under an act of the legislative assembly of the territory of Minnesota entitled "An act to incorporate the Minneaplis and St. Cloud Railroad Company," approved March 1, 1856, and acts amendatory thereof and supplemental thereto, and particularly an act entitled "An act to amend an act entitled 'An act to incorporate the Minneapolis and St. Cloud Railroad Company' approved March 1, 1856, and to repeal certain portions of an act amending the charter of said company passed February 23, 1864," approved Feb. 28, 1865, and an act entitled "An act to amend the charter of the Minneapolis and St. Cloud Railroad Company," approved March 2, 1870 (Trans. pp. 28, 315-330, 341, 342).

The Eastern Railway Company of Minnesota was organized under section 6 of said act of February 28, 1865 (Trans. pp. 325-326), as a sub-company of

the Minneapolis and St. Cloud Railroad Company, its organization being completed in 1887 and its line of railroad from Hinckley to Superior having been built in 1888. Plaintiff-in-error is the Minneapolis and St. Cloud Railroad Company under a change of name.

By the act of March 2, 1870 (Trans. pp. 329-330) it is provided that in consideration of an annual payment of a per centum of the gross earnings of the Minneapolis and St. Cloud Railroad Company as provided in the act the road and its appurtenances and all other property, estate and effects of the Minneapolis and St. Cloud Railroad Company, and also all the stock and capital of the said company shall be forever exempt from all assessment and taxation; and that in consideration of the grants conferred upon said company and of the exemption contained in the act the company shall, during the first three years after thirty miles of its road shall be completed and in operation, pay one per centum on the gross earnings of said railroad; during the next seven years two per cent on said earnings, and thereafter three per centum; said payment to be in lieu and in full of all taxes and assessments of every nature.

In section 2 it is enacted that the provisions of the law shall extend to the Minneapolis and St. Cloud Railroad and all its branches.

This is a special act amending a special charter. The act was passed at a time when it was the established law of Minnesota that gross earnings tax laws were constitutional and valid. It con-

stituted a valid and binding contract as to taxation of the lines of the Eastern Railway Company of Minnesota and of the lines of plaintiff-in-error. Therefore the same rate of taxation upon gross earnings is applicable to the lines of the Manitoba Company and the lines of the Eastern Railway Company and the state would in no way be harmed if no separation of earnings were made.

The act of May 22, 1857, as amended by the act of March 2, 1865, does not require that an account of the earnings of the Manitoba lines be kept separately from the earnings of other lines. It is merely provided that for the purpose of ascertaining the gross earnings of said railroad accurate accounts of such earnings shall be kept by said company. If the total of the earnings from the Manitoba lines was kept (and as to this there is no dispute) and if taxes on these earnings are payable at the rate required nothing further is demanded by the acts referred to.

VII.

THE CONTRACT AS TO TAXATION ATTACHES TO AND CONTROLS THE TAXATION NOT ONLY OF THE LINES FROM ST. PAUL TO BRECKENRIDGE AND FROM EAST MINNEAPOLIS TO ST. VINCENT, BUT OF ALL THE BRANCH LINES.

The district court of Ramsey county held that the contract as to taxation covered taxation of the lines from St. Paul to Breckenridge and from East Minneapolis to St. Vincent but did not cover the taxation of the various branch lines.

(1) THE ACT OF MAY 22, 1857, AUTHORIZED BRANCH LINES.

The act, section 7, provided:

> "The said company shall have the right and authority to construct their said railroad and branches upon and along, across, under or over any public or private highway, road, street, plank road or railroad if the same shall be necessary."
>
> (Trans. p. 99).

Again:

> "Said company shall have power to connect the said railroad or branches with any other railroad or branch thereof in this territory or state or in the state of Wisconsin, and to operate the same in connection with such other railroad or branch under such name and on such terms as may be agreed upon by and between said companies, or to purchase from any other railroad company the whole or any part of any railroad or branch railroad owned by such company."
>
> (Trans. pp. 99, 100).

It is apparent that any railroad or branch located in the state of Wisconsin and which might be acquired by the Minnesota Company or its successors, could not possibly be a part of either of the lines specifically described in section 2 of the act (Trans. p. 97).

Section 13 of the act provides that whenever the line of said railway and branches or any part thereof shall be located and its route determined the company may condemn right of way for the railroad (Trans. p. 101).

Section 16 makes a grant of lands to the company and provides that the grant shall be conditioned "that said lands shall be exclusively applied to the construction of that road for which it was granted" (Trans. p. 105).

The act of Congress granted lands to the territory of Minnesota for the purpose of aiding in the construction of a railroad from Stillwater, by way of St. Paul, to a point between the foot of the Big Stone Lake and the mouth of the Sioux Wood river with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North. The grant by Congress is specific and is granted only for the purpose of aiding in the construction of the roads named in the act of May 22, 1857. Why, then, should the legislature of the territory make its grants upon condition that the lands be applied to the construction only of those roads?

By section 21 of the act (Trans. p. 107), the company is authorized to execute bonds and to execute and deliver mortgages upon the whole or any part

185

of its railroad or branches to secure the payment of the bonds. The trustee in the mortgage is authorized to take possession of the railroad or branches or any part thereof, and all corporate or other franchises and privileges and to sell the same or any part thereof and execute conveyances thereof to the purchasers.

These sections plainly contemplate the construction, acquisition, maintenance and operation by the company of lines of railway other than those named in section 2.

(2) BY THE PROVISIONS OF THE LATER LAWS UNDER WHICH THE BRANCHES WERE CONSTRUCTED THEY WERE PLACED ON THE SAME BASIS AS TO TAXATION AS THE MAIN LINES.

Chapter 31 of the Laws of 1881 (App. p. 10-11), provides that railway companies in Minnesota may construct branch lines upon adopting and filing a resolution describing the lines, and that upon the filing of the resolution the company adopting the same shall have with reference to the branch line all the rights, privileges and immunities which it possesses with respect to its main line.

In the case of *Railway Co. v. Olson Co.*, 81 Minn. 265, 270, the court, speaking with reference to this act, said:

> "The effect of this provision is to place all extensions on an equal footing with other lines, that is, lines provided for by charter or articles."

In view of the construction placed by the Minnesota supreme court upon statutes extending the gross earnings provisions of the act of May 22, 1857, as amended to lines authorized by acts passed after the admission of the state and constructed by other companies, it would seem that this law was constitutional and valid.

Railway Co. v. Pfaender, 23 Minn. 217.

State v. Northern Pacific Co., 36 Minn. 207.

In addition to this each of the branch lines constructed by the St. Paul Company and its successors was authorized by special act of the legislature which enacted that as to the branch line authorized the company should possess all the franchises, immunities and privileges granted by the charter as to the main line (Exhibits 21, ff. Trans. p. 172. ff.).

(3) THE CONTRACT AS TO TAXATION CLEARLY COVERS BRANCH AS WELL AS MAIN LINES.

Section 15 of the charter provides that no tax shall ever be levied on the stock shares of said company except the yearly payment provided by section 18 of the act. Section 18 of the act provides for the payment of gross earnings tax in lieu of other taxation upon all the stock of said company, whether belonging to the company or to individuals and upon all franchises or estate, real, personal or mixed, held by the company. To secure the payment the state has a lien upon all the railroads and property, including the branch lines of the com-

pany. The provisions of section 18 have been changed only as to the rate of taxation.

Railway Co. v. Pfaender, supra.

By the provisions of the charter all the stock of the company is exempt from taxation in consideration of the payment of gross earnings tax. The stock of the company represents not only the line as described in section 2, but all other lines, including the branches described in the findings made by the district court of Ramsey county. Section 18 expressly states that in consideration of the payment of the gross earnings tax all the estate, property and stock of the company shall be exempt from taxation. The Minnesota court has frequently held that the gross earnings tax pays the taxes only on the railroads, the granted lands and the property used for railway purposes, and does not pay the taxes on other property.

County of Todd v. Manitoba Co., 38 Minn. 163.

County of Hennepin v. Manitoba Co., 42 Minn. 238.

If the earnings of the branch lines are not taxable at the rate prescribed by section 18 as amended, they are not taxable at all, because the gross earnings tax paid as required by section 18 of the act of May 22, 1857, as amended by later acts, includes the taxes on all property of the company used for railway purposes. Branch lines are certainly used for railroad purposes.

An exemption of the capital and other property of the company in consideration of the gross earn-

ings tax exempts all other property used for the purpose of the corporation.

Powers v Railway Co., 201 U. S. 543, 561.

Bank v. Parker, 192 U. S. 73, 85.

Bank v. Tennessee, 161 U. S. 134, 142.

Tennessee v. Whitworth, 117 U. S. 129, 130.

Railway Co. v. Dennis, 116 U. S. 665, 669.

Bank v. Tennessee, 104 U. S. 493.

Farrington v. Tennessee, 95 U. S. 679, 681.

The state, however, seeks to avoid this conclusion by claiming that the contract as to taxation is to be strictly construed because it is an exemption from taxation. This rule has no application because the contract does not create an exemption, but a commuted form of taxation. As the contract does not create an exemption from taxation it is to be liberally construed.

McHenry v. Alford, 168 U. S. 651, 662.

St. Paul v. Railroad Co., 23 Minn. 469, 470, 471.

State v. Luther, 156 Minn. 160.

County of Traverse v. Railway Co., 73 Minn. 417, 425.

Electric Co. v. Milwaukee, 95 Wis. 42, 69 N. W. 796, 797.

Railway Co. v. Milwaukee, 34 Wis. 271, 277-278.

Railway Co. v. Crawford County, 29 Wis. 116, 123-124.

Trust Co. v. Binghamton, 76 N. Y. Supp. 517, 519.

In *McHenry v. Alford*, this court said:

> "The principle that exemption from taxation must be clearly shown and that it generally applies (if at all) only to property used in the business of the company claiming the exemption, is acknowledged and assented to. The case of Ford v. Delta Pine & Land Co., 164 U. S. 662, is an illustration of the principle, but it does not here apply. The language of this act is clear and absolute. It is also not the case of an exemption from taxation, but the substitution of one method for another."

In *St. Paul v. Railroad Co.*, the supreme court of Minnesota said:

> "It is claimed by the plaintiff that the provision contained in section 9 of the act of May 22, 1857 (laws 1857, Ex. Sess. c. 1, subc. 3, sec. 9, p. 20) exempting the land grant of the defendant corporation from all taxation and requiring the annual payment of three per cent of the gross earnings of its road 'in lieu of all taxes whatsoever' upon the property of said company, must be strictly construed as having reference solely to general or ordinary taxes, and not to special or local assessments, because of the general rule giving to the words 'taxation' and 'all taxes' that limited meaning.
>
> When used in statutes granting immunity from taxation such undoubtedly is the general rule to be observed in construing statutes strictly of that character as is the case of statutes exempting burial grounds, cemeteries, churches, public school buildings and the like, absolutely from all taxation. * * * When, however, the statute relieves, as in this case, the corporate grantee of the exemption from no portion of its just and equal share of taxation in respect to any of its property, but merely provides a mode of commutation therefor based upon a percentage of earnings or income agreed upon as a just equivalent equally advantageous and beneficial to the state, this

> rigid rule of construction applied to such a condition of things must be so far modified as to harmonize with other well settled rules of construction observed in determining the meaning of a contract of this character."

In *County of Traverse v. Manitoba Co.*, the court said:

> "It has been repeatedly held by this court, as well as by the Supreme Court of the United States, that the substitution of an assessment upon gross earnings in lieu of all other taxes on the road and the granted lands does not exempt the lands from taxation, but merely substitutes one method of taxation for another, upon the terms and conditions specified; and for that reason the latter court, which is very tenacious of the doctrine that an exemption from taxation must be clearly shown and strictly construed, has held that this doctrine does not apply, at least to its full effect, to such a case."

Construing the contract as to taxation in accordance with the plain, ordinary meaning of its language, it covered the taxation not only of the lines described in section 2 of the charter, but of all other lines built by virtue of the charter. The supreme court of Minnesota has so decided in two cases.

Railway Co. v. Pfaender, 23 Minn. 217.

State v. Nor. Pac. Co., 36 Minn. 207.

VIII.

CHAPTER 253 LAWS 1903 PROVIDING FOR A FOUR PER CENT GROSS EARNINGS TAX IMPAIRS THE OBLIGATION OF THE CONTRACT CREATED BY THE ACT OF MAY 22, 1857, AND AMENDATORY ACTS.

The original contract provided for the payment of gross earnings tax at the rate of three per cent per annum after construction of fifty miles of road. In 1865 the contract was amended so as to provide for the payment of gross earnings tax after the completion of the first thirty miles of road, the rate to be one per cent for the first three years after the completion of thirty miles, two per cent for the next ensuing seven years and three per cent thereafter. The maximum rate of taxation under the contract was three per cent and in consideration of this payment the railroads, lands and all property used for railway purposes were to be exempt from taxation.

Chapter 253 increases the rate of taxation to four per cent but does not increase or attempt to increase the exemption. It therefore plainly impairs the obligation of the contract. The Anderson law passed by the legislature of Minnesota in 1895 and before this court in *Stearns v. Minnesota*, 179 U. S. 223, attempted to leave the rate of taxation on the gross earnings unchanged, but to take out from the exemption the granted lands. The Anderson law was held to impair the obligation of the contract.

It is to be borne in mind that the original contract as to taxation had been construed and its meaning had been settled by the supreme court of Minnesota prior to the purchase and acquisition of the railroads by the persons who organized the Manitoba Company in 1879. Before this date the supreme court of Minnesota had decided the following cases.

First Div. Co. v. Parcher, 14 Minn. 297 (Gil. 224).

State v. Railroad Co., 21 Minn. 315.

First Div. Co. v. St. Paul, 21 Minn. 526.

Railway Co. v. Pfaender, 23 Minn. 217.

St. Paul v. Railroad Co., 23 Minn. 469.

The persons who at the foreclosure sale purchased the railroads of the St. Paul Company and the First Division Company and organized as the Manitoba Company relied, as they had a right to do, upon the foregoing decisions.

Prior to the lease by the Manitoba Company to the plaintiff-in-erorr the foregoing cases had been re-enforced by the following:

County of Nobles v. Railroad Co., 26 Minn. 294.

State v. Manitoba Co., 30 Minn. 311.

State v. Nor. Pac. Co., 32 Minn. 294.

County of Hennepin v. Manitoba Co., 33 Minn. 534.

County of Ramsey v. Railroad Co., 33 Minn. 537.

County of Stevens v. Manitoba Co., 36 Minn. 467.

State v. Northern Pac. Co., 36 Minn. 207.

County of Todd v. Manitoba Co., 38 Minn. 163.

The rule laid down in each of the foregoing cases is in accord with the contention of plaintiff-in-error. The law as established entered into the contracts of purchase and lease. To permit the law to be changed so as to render valid Chapter 253 Laws 1903, is to impair the obligation of the contract by judicial opinion.

We submit that such a method of impairing contracts should not receive the approval of this court in view of the fact that investments have been made on the faith of the construction heretofore placed by the supreme court of Minnesota upon the very contract in the case at bar.

In the language of this court in *Muhlker v. Railway Co.*, 197 U. S. 544, 570:

> "We are not called upon to discuss the power or the limitations upon the power of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the constitution of the United states."

See also, Hardin v. Jordan, 140 U. S. 371.

That the law in question impairs the obligation of the contract as to taxation is too clear for discussion:

Dartmouth College v. Woodward, 4 Wheat. 518.

Insurance Co. v. Debolt, 16 How. 416, 432.
Gelpcke v. Dubuque, 1 Wall. 175.
Humphrey v. Pegues, 16 Wall. 244.
Bradley v. Lightcap, 195 U. S. 1, 16.
O'Brien v. Krenz, 36 Minn. 136.
Dunn v. Stevens, 62 Minn. 380.
Bank v. Rugg, 78 Minn. 256.
Telephone Co. v. Minneapolis, 81 Minn. 140.
Shell v. Matteson, 81 Minn. 38.

For the reasons discussed we contend that the judgment below should be reversed.

Respectfully submitted,

WM. R. BEGG,
For Plaintiff-in-Error.

APPENDIX.

Article IX Section 10 Constitution of Minnesota as amended April 15, 1858.

"Sec. 10. The credit of this state shall never be given or loaned in aid of any individual, association or corporation, except that for the purpose of expediting the construction of the lines of railroads, in aid of which the Congress of the United States has granted lands to the Territory of Minnesota, the Governor shall cause to be issued and delivered to each of the companies in which said grants are vested by the Legislative Assembly of Minnesota, the special bonds of the state, bearing an interest of seven per cent per annum, payable semi-annually in the City of New York, as a loan of public credit, to an amount not exceeding twelve hundred and fifty thousand dollars, or an aggregate amount to all of said companies not exceeding five millions of dollars, in manner following, to-wit:

Whenever either of the said companies shall produce to the Governor satisfactory evidence, verified by the affidavits of the Chief Engineer, Treasurer and two directors of said company, that any ten miles of the road of said company has been actually constructed and completed, ready for placing the superstructure thereon, the Governor shall cause to be issued and delivered to such company, bonds to the amount of one hundred thousand dollars; and whenever thereafter, and as often as either of said companies shall produce to the Governor like evidence of a further construction of ten miles of its road, as aforesaid, then the Governor shall cause to be issued to such company further like bonds to the amount of one hundred thousand dollars for each and every ten miles of road thus constructed; and whenever such

company shall furnish like evidence that any ten miles of its road is actually completed and cars running thereon, the Governor shall cause to be issued to such company like bonds to the amount of one hundred thousand dollars; and whenever thereafter, and as often as either of said companies shall produce to the Governor like evidence that any further ten miles of said road is in operation as aforesaid, the Governor shall cause to be issued to such company further like bonds to the amount of one hundred thousand dollars until the full amount of the bonds hereby authorized shall be issued; Provided, That two-fifths, and no more, of all bonds issued to the Southern Minnesota Railroad Company, shall be expended in the construction and equipment of the line of road from La Crescent to the point of junction with the Transit Road, as provided by law. And further provided, that the Minneapolis and Cedar Valley Railroad Company shall commence the construction of their road at Faribault and Minneapolis, and shall grade an equal number of miles from each of said places.

The said bonds thus issued shall be denominated 'Minnesota State Railroad Bonds,' and the faith and credit of this state are hereby pledged for the payment of the interest and the redemption of the principal thereof. They shall be signed by the Governor, countersigned and registered by the Treasurer, sealed with the seal of the State, of denominations not exceeding one thousand dollars, payable to the order of the company to whom issued, transferable by the endorsement of the president of the said company, and redeemable at any time after ten and before the expiration of twenty-five years from the date thereof. Within thirty days after the Governor shall proclaim that the people have voted for a loan of state credit to railroads, any of said companies proposing to avail themselves of the loan herein provided for, and to accept the conditions of the same,

shall notify the Governor thereof, and shall, within sixty days, commence the construction of their roads; and shall, within two years thereafter, construct, ready for the superstructure, at least fifty (50) miles of their road. Each company shall make provision for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said company, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this state from any advances of money for that purpose; and as security therefor, the Governor shall demand and receive from each of said companies, before any of said bonds are issued, an instrument pledging the net profits of its road, for the payment of said interest, and a conveyance to the state of the first two hundred and forty sections of land, free from prior incumbrances, which such company is or may be authorized to sell in trust for the better security of the treasury of the state from loss on said bonds, which said deed of trust shall authorize the Governor and secretary of State to make conveyances of title to all or any of such lands, to purchasers agreeing with the respective railroad companies therefor. Provided, that before releasing the interest of the state to such lands, such sale shall be approved by the Governor, but the proceeds of all such sales shall be applied to the payment of interest accruing upon the bonds in case of default of the payment of the same, and as a sinking fund to meet any future default in the payment of interest and the principal thereof when due; and as further security, an amount of first mortgage bonds on the roads, lands and franchises of the respective companies, corresponding to the state bonds issued, shall be transferred to the treasurer of the state at the time of the issue of state bonds, and in case either of said companies shall make default in payment of either the interest or principal of

the bonds issued to said companies by the Governor, no more state bonds shall thereafter be issued to said company, and the Governor shall proceed in such manner as may be prescribed by law, to sell the bonds of the defaulting company or companies, or the lands held in trust as above, or may require a foreclosure of the mortgage executed to secure the same; provided, that if any company so in default, before the day of sale, shall pay all interest and principal then due, and all expenses incurred by the state, no sale shall take place, and the right of said company shall not be impaired to a further loan of state credit; provided, if any of said companies shall at any time offer to pay the principal, together with the interest that may then be due upon any of the Minnesota State Railroad Bonds, which may have been issued under the provisions of this section, then the treasurer of State shall receive the same; and the liabilities of said company or companies, in respect to said bonds shall cease upon such payment into the state treasury, of principal, together with the interest as aforesaid: Provided further, That in consideration of the loan of state credit herein provided, that the company or companies which may accept the bonds of the state in the manner herein specified, shall, as a condition thereof, each complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and complete four-fifths of the entire length of its road before the year 1866, and any failure on the part of any such company to complete the number of miles of its road or roads, in the manner and within the several times herein prescribed, shall forfeit to the state, all the right, title and interest of any kind whatsoever in and to any lands, together with the franchises connected with the same not pertaining or applicable to the portion of the road by them constructed, and a

fee simple to which has not accrued to either of said companies, by reason of such construction, which was granted to the company or companies, thus failing to comply with the provisions hereof, by act of the Legislature of the Territory of Minnesota, vesting said land in said companies respectively."

Article IX Section 10 Constitution of Minnesota as amended November 6, 1860.

"The credit of the state shall never be given or loaned in aid of any individual, association or corporation. Nor shall there be any further issue of bonds denominated 'Minnesota State Railroad Bonds' under what purports to be an amendment to section ten of article nine, of the constitution, adopted April 15, 1858, which is hereby expunged from the constitution, saving, excepting and reserving to the state, nevertheless, all rights, remedies and forfeitures accruing under said amendment."

Chapter 72 General Laws 1858.

"Sec. 1. Each and every railroad company entitled to, and accepting the loan of state credit authorized by section X of Article 9 of the Constitution, shall make due provision for the punctual payment of the interest and the final redemption of the Minnesota Railroad Bonds, issued to such company by the state, and to this end, every such railroad company shall provide and arrange that semi-annual payments of interest and final payments of the principal of the first mortgage bonds of any such railroad company, which may be or shall have been transferred to this state on the roads, lands and franchises of any such company, corresponding to the state bonds to such company issued, shall mature and be payable at least sixty days before the maturity of the principal or interest of the Minnesota State

Railroad Bonds issued and delivered or to be issued, and delivered to such company; and the interest and principal of said railroad bonds which may have been transferred to the state, shall be paid at the maturity thereof to the treasurer of the state, together with such amount as may be necessary to pay all exchanges or expenses in payment of the ensuing installments or interest or principal of the Minnesota State Railroad Bonds, issued for the benefit or use of such railroad company. And all such railroad companies claiming or receiving state aid, shall further make due provision that all necessary expenses or charges incurred to carry out the provisions of this enactment, and the provisions of the said Section ten article nine of the Constitution authorizing and having reference to a loan of state credit to railroads, shall be borne, and paid *pro rata*, by such railroad companies as may receive the benefits thereof, and shall not be chargeable to the state.

Sec. 2. Whenever any default shall occur in the payment of interest or principal of the railroad bonds transferred to the state, so that no provision shall be made by the said railroad companies as aforesaid, for the ensuing payment of the interest or principal of the Minnesota State Railroad bonds, sixty days before the maturity of any installment of interest or final redemption of said state railroad bonds as herein provided, the Governor shall immediately proceed to provide for such payment or payments, and to indemnify the state for such payment or payments, or responsibility, by sale of a sufficient amount of the bonds of the defaulting company, or by sale of the lands pledged, or foreclosure of the mortgage or deed of trust of such defaulting company, or by all or any such means of indemnification in the manner herein provided.

Sec. 3. The Governor may on such default immediately advertise for thirty days in three

newspapers published in the city of New York, and in one newspaper published at the seat of government of this state, that a sufficient amount of first mortgage bonds of such defaulting company shall be sold on the fortieth day after such default, in the city of New York, to the highest bidder for cash, and such sale of bonds shall be made accordingly, and the proceeds thereof shall be returned to the treasury to indemnify the state for such default, together with all costs, charges and damages growing out of such default and sale.

Sec. 4. In case of a sale of lands to be made under and to provide for the default of any such company as aforesaid, the Governor may advertise and sell the same in such parcels, and at such times, as shall be deemed most expedient, and all such sales or conveyances shall be made by the Governor and Secretary of State, and shall be absolute conveyances of the title in fee as far as the same may have been invested in any such company, or in the state, and without any redemption or right of redemption in any company, or subsequent creditor, person or persons whomsoever, but no sales of bonds or lands shall take place if the defaulting company shall make payment of all principal and interest then due, and all expenses incurred by the state prior to the day of sale of any such railroad bonds or lands, but this provision shall not be so construed as to prevent the Governor and Secretary of State, until such payment by the defaulting company, from making sales and conveyances of any parcels of lands, as aforesaid, without the consent or assistance of the defaulting company, whenever default shall occur in the provision by such company as herein required, for any ensuing payment of interest or principal of the Minnesota State Railroad bonds issued to such company."

"Sec. 5. All foreclosures of the mortgage or deed of trust of any defaulting company

making such default, in the payment of interest or principal of the bonds of such company and for which default a foreclosure of the mortgage or deed of trust of such company may be required, or demanded, shall be made only for and on account of the default occurring, and all such foreclosures shall be by public sale of all the properties, rights, privileges and franchises pledged in such deed of trust or mortgage, for the payment of the interest and final redemption of such company's bonds, due notice having first been given of such intended sale, by advertisement in such manner and for such length of time as may be prescribed in said deed of trust or mortgage; and in case of any sale of any railroad or railroads, or any part thereof, constructed, or in process of construction, by any railroad company by virtue of any trust deed. or on foreclosure of any mortgage thereupon, the party or parties acquiring title under any such sale, and their associates, successors, or assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter, all and the same rights, privileges, grants, franchises, immunities and advantages in and by said mortgage or trust deed enumerated and conveyed which belonged to and were enjoyed by the company making such deed or mortgage, or contracting such debts, so far as the same relate and appertain to that portion of said road, or the line thereof, mentioned and described in and conveyed by said mortgage or trust deed, and no further, as fully and absolutely, in all respects as the corporators, shareholders. officers and agents of such company, might or could have done theretofore, had not such sale or foreclosure taken place. Such purchaser or purchasers, their associates, successors or assigns, may proceed to organize anew and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner pro-

vided in the charter of such railroad company, with such changes or variations in manner and form of organization as their altered circumstances and better convenience may seem to require; Provided, however, that no greater or enlarged powers shall be exercised by the new organization than are conferred by the charter of such company.

Sec. 6. The Governor may, at any time during the prosecution of the work on any sections of road entitling any company to an issue of state bonds, engage the services of practical engineers or surveyors to visit, examine and report upon the amount and quality of all work done or being done thereon; and such engineers or surveyors shall certify under oath to the Governor the condition and character of all such work, particularly specifying the quality, extent and character of the grading and excavations, as well as respectively all mechanical structures and other appurtenances of any such road or section, and whether in the opinion of such engineer or engineers, surveyor or surveyors, such railroad company are entitled to an issue of state bonds on account of such particular section or sections of road; but no such certificate, examination or proof shall be deemed conclusive or final, but new surveys or examinations may be ordered or other proof received in the discretion and to the satisfaction of the Governor before any such state bonds shall be issued thereon."

Chapter 82 General Laws Minnesota 1860.

"Section 1. Default having been made in the payment of interest on the bonds issued by the Land Grant Railroad Companies to and held by the state, and the trustees under the deed or deeds of trust given to secure such bonds having neglected to foreclose the same according to the provisions of such deed or deeds of trust, it is hereby made the duty of

the Governor to foreclose the same, or to cause the same to be foreclosed in conformity with the provisions of such deed or deeds of trust, and in accordance with law, if in his opinion the public interest requires it.

Sec. 2. Upon the sale of the property, rights and franchises, covered and embraced in such deed or deeds of trust under such foreclosure hereinbefore mentioned, the Governor is hereby authorized and empowered in his discretion to bid off and purchase the same for, and in the name of the state, and to make or cause to be made to the state of Minnesota such suitable and proper conveyances as may be necessary."

Chapter 31 General Laws Minnesota 1881.

"Section 1. Any railroad corporation heretofore or hereafter organized pursuant to any law of this state, may exercise all its rights, franchises and privileges in any other state or territory of the United States under and subject to the laws of the state or territory where it may exercise the same and may use any additional or other powers or privileges, applicable to the carrying of persons or property by railroad or steamboat in such state or territory, or otherwise applicable to the doings of such corporation in such state or territory.

Sec. 2. Any railroad corporation may, under the provisions of this chapter, extend its railroad from any point named in its charter or articles of incorporation, or may build branch railroads either from any point on its line of raiload, or from any point on the line of any other railroad between such points connecting with its line of road, or to be connected therewith, or with any line of road such corporation may have acquired the use under lease for a term of not less than ten (10) years. Before making such extension or build- such branch road, such corporation shall, by

resolution of its board of directors, to be entered in the record of its proceedings, designate the route of such extension or branch, a copy of which and a plat or map thereof, duly certified by such corporation under the seal thereof, signed and verified by the president and secretary of such company, and file the same in the office of the Secretary of State of this state, who shall record the same in a book to be provided for such purpose. Whereupon such corporation shall have and exercise with respect to such extension or branch all the rights, powers, franchises and privileges possessed by such corporation pertaining to its main or other line of railroad, but no right of way over any private property or any street or highway in this state shall be acquired in any other manner than as provided in this chapter. And all the provisions of this chapter shall apply thereto, and may receive municipal and other aid in the construction of such branch or extension as now or hereafter authorized by the General Laws of this state. Provided, that the provision of this act shall not apply to street railroads or street railroad companies."

Chapter 94 General Laws Minnesota 1881.

"Section 1. Any railroad corporation, either domestic or foreign, whether organized under a general law or by virtue of a special charter, may lease or purchase, or in any way become owner of or control, or hold the stock of, any other railroad corporation, when their respective railroads can be lawfully connected and operated together so as to constitute one continuous main line, with or without branches.

Sec. 2. Any railroad corporation, whether organized under a general law or by virtue of a special charter of the state or territory of Minnesota, or under the laws of any other state or states or territory, whose lines of railroad now or hereafter constructed within or

without this state can be lawfully connected and operated together to constitute one continuous main line, with or without branches, so as to admit of the passage of trains over them without break or interruption, may consolidate their stock and franchises upon such terms as may be agreed upon, so as to become one corporation by any name by them selected.

Articles stating the terms of consolidation shall be approved by each corporation by a vote of the stockholders owning a majority of the stock, in person or by proxy, at either a regular annual meeting thereof, or at a special meeting called for that purpose, by notice of at least thirty (30) days, stating the object of such meeting, to be addressed to each of such stockholders when their place of residence is known, and deposited in the post office, and published for at least three (3) successive weeks in one newspaper in at least one of the cities or towns in which each of said corporations has its principal business office, or by the consent in writing of a majority of such stockholders annexed to such articles; a copy of such articles of consolidation and of the record of such approval or of such consent, accompanied by lists of the stockholders of said corporation, and the number of shares held by each, duly certified by their respective presidents and secretaries, with the respective corporate seals thereto affixed of said corporations, shall be filed for record in the office of the Secretary of State of this state, and of the state or states or territory by or under whose laws the said corporations parties to such articles of consolidation were created or exist, before any such consolidation shall have any validity or effect. Upon the filing for record of said copies the said corporations shall become merged in the new corporation provided for in said articles, to be known thereafter by the corporate name therein adopted, and shall within this state, succeed to all the rights,

powers, franchises, contracts, privileges, immunities, liabilities, obligations and duties, liabilities to or exemption from taxation, commutations, property, real, personal and mixed, and things in action, as fully in all respects as the same were possessed by such old corporation or corporations at the time of such consolidation under the laws of this state; and such new corporation shall hold and enjoy the same, and all and every part thereof, without impairment or change as fully in the same manner and to the same extent as if the said consolidation had not taken place. Provided, that all rights of creditors, and all the liens upon the property of either of said old corporations shall be preserved unimpaired, and all the debts, liabilities and duties of either of said consolidating corporations shall thenceforth attach to said new corporation, and be enforceable to the same extent, and in the same manner as if such debts, liabilities and duties had been originally incurred by it. Provided further, that all such corporations shall be subject to the laws of this state and the jurisdiction of the courts of this state in the same manner and to the same extent as domestic corporations.

Sec. 3. No railroad corporation shall consolidate with, lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchises, rights of property thereof, which owns or controls a parallel or competing line."

Revised Laws 1905.

"Sec. 2895. Any domestic or foreign railroad corporation may lease, purchase, or in any other way become the owner of, or may control, or hold the stock of, any other railroad company, whenever their respective roads can be lawfully connected and operated to-

gether so as to constitute one continuous line, with or without branches. Whenever such lease or purchase shall be made by a foreign corporation, it shall not be effectual for any purpose until such corporation shall have first complied with all the laws of this state pertaining to such corporations, when it shall have the same rights, powers and privileges, and be subject to the same duties, obligations and liabilities, in respect to the railroad so leased or purchased, as pertained to such road. The corporation so leasing or purchasing shall be subject to any law of this state now in force or hereafter enacted relating to the taxation of the property so leased or purchased. But no railroad corporation shall consolidate with, lease or purchase, or in any way become the owner or have control of any other railroad corporation, or any stock, franchises, rights, or property thereof, which owns or controls a parallel or competing railroad to and with the railroad owned or controlled or operated by such leasing or puchasing railroad corporation; and the question whether any of such railroads are parallel or competing lines shall, when determined by the party complaining, be decided by jury as in other civil actions."

"Sec. 2896. The consolidation of the capital stock, lines, property, franchises, control, or the power of control, of two or more parallel and competing lines of railroad in the hands of any corporation, trustee, agent, or representative of any corporation, wheresoever situated, is hereby prohibited and made unlawful."

"Sec. 2897. Any domestic or foreign railroad corporation, upon such terms as may be agreed upon, may consolidate its stock and franchises with any other railroad corporation whose lines of railroad now or hereafter constructed within or without this state can be lawfully connected and operated with such first-named corporation, so as to constitute one continuous main line, with or without branch-

es, and admit of the passage of trains over them without break or interruption, and may become one corporation under any name selected by them. A certificate stating the terms of consolidation shall be approved by each corporation by a vote, in person or by proxy, of the stockholders owning a majority of the stock, at a regular annual meeting thereof, or at a special meeting called for that purpose by not less than thirty days' personal notice, or by published notice at its principal place of business, stating the object of such meeting, and by mailing a copy of such notice to each stockholder whose residence is known, or by the written consent of a majority of such stockholders attached to the certificate. Before such consolidation shall be effective for any purpose, a copy of the certificate thereof, and of the record of such approval or consent, and a list of the stockholders of each corporation and the number of shares held by each, duly certified by its president and secretary under its corporate seal, shall be filed for record in the office of the secretary of state of this state and of each state or territory under whose laws the corporations so consolidating were organized."

"Sec. 2898. Upon the filing for record of said copies, such corporations shall become merged in the new corporation, which shall thereafter be known by the name agreed upon. Within this state, such corporation shall succeed to all the rights, powers, franchises, contracts, privileges and immunities, and be subject to the same duties, liabilities and obligations in all respects as were granted to or imposed upon the original corporations; but all rights of credits and all liens upon the property of either of the consolidating corporations shall be preserved unimpaired, and all the debts, liabilities and duties of either shall thenceforth attach to the new corporation, and be enforceable to the same extent and in the

same manner as if such debts, liabilities and duties had been originally incurred by it. Such corporation shall be subject to the laws of this state and the jurisdiction of its courts in the same manner and to the same extent as domestic corporations."

Special Laws 1873, Chapter 111.

"Section 1. In consideration of an annual payment of a per centum, as provided in this section, by the St. Paul, Stillwater and Taylor's Falls Railroad Company, the railroad, its appurtenances and appendages, and all other property, estate and effects of said corporation held or used for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, including the lands granted to said company to aid in the construction of said railroad, as also the stock and capital of said company shall be and hereby are forever exempt from all taxation and from all assessments, and in consideration of the grants made to and the privileges conferred upon the said company and the exemption contained in this section, the said company shall during the first three years from and after January 1, 1872, on or before the first day of March of each and every year, pay into the treasury of this state one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March, one thousand eight hundred and seventy-three, or within fifteen days after the passage of this act; and shall during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of the state, on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad; and shall from and after the expiration of ten years from the said first day of January, one thousand eight hundred and seventy-two, on or before the first day of

March of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad, and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this state on or before the first day of February in each year, the truth of which abstract shall be verified by affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstract, full power is hereby vested in the governor of this state or any other person appointed by law prescribed to examine, under oath, the officers and employes of said company or other persons; and if any person so examined by the governor or other authorized person, shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for security to the state the payment of aforesaid per centums, it is hereby declared that the state shall have a lien upon the railroad of said company, and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall have and take precedence of all demands, decrees and judgments against said company. Provided, That the lands of said company shall be subject to taxation as soon as sold, leased or contracted to be sold or leased.

Sec. 2. Any railroad company owning or operating or which may hereafter own or operate any line or lines of railroad in this state, may by resolution of its board of directors attested by its secretary and filed with the secretary of state, accept and become subject to the provisions of this act, and in such case

the payment of such percentage in lieu of taxes in accordance therewith, shall commence from and after the first day of March next after the date of the completion of thirty miles of such line hereafter built, or of the entire line if the same shall be less than thirty miles in length."

General Laws Minnesota 1887, Chapter 11.

"Section 1. Any railroad company owning or operating or which may hereafter own or operate, any line or lines of railroad in this state, which has not accepted and become subject to sections one (1) and two (2) of chapter one hundred and eleven (111) of the special laws of eighteen hundred and seventy-three (1873) relative to taxation, or some special act or acts relating to taxation of the company accepting the same, shall become liable to pay, and shall pay a percentage of its gross earnings, in lieu of all other taxes in accordance with the provisions of the chapter hereinbefore referred.

Sec. 2. No railroad, or branch, or extension of a railroad in this state shall hereafter be opened for public use until the management thereof shall officially notify the railroad and warehouse commission that the same is finished and in a safe condition for operation. Within one year after such notification the corporation constructing or operating such railroad, branch or extension, shall file in the office of said commission a map and profile thereof, with table of grades, curvatures, and mileage, and a statement of the other characteristics of the road, certified by its president and engineer, in such form as the board may prescribe."

General Laws 1889, Chapter 235.

"Section 1. That any railroad company organized under the laws of other states is

hereby authorized, upon being incorporated in this state as hereinafter provided, to build and extend its road into, through, or across the state of Minnesota, and such railroad company shall have and possess all the powers, franchises, immunities and privileges and be subject to the same liabilities as railroad companies organized and incorporated under the general laws of this state.

Provided, And this act is upon the express condition which is accepted by any company that avails itself of the provisions of this act, and which is in accord with the uniform practice of all railroad companies heretofore reporting 'gross earnings' for taxation under the laws of this state, that the term 'gross earnings' as used in sections one (1) and two (2) of chapter one hundred and eleven (111) of the general laws of one thousand eight hundred and seventy-three (1873) and in section one (1) of chapter eleven (11) of the general laws of one thousand eight hundred and eighty-seven (1887), shall be construed to mean all earnings on business beginning and ending within the state and a proportion based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state, and shall include gross earnings of all express companies, fast freight lines, sleeping and parlor car companies, and other common carriers, corporations or persons doing business or transporting persons or property on and over the lines or right of way of any railroad company within this state by virtue of an agreement, contract or arrangement of any nature with such railroad company.

Provided, Such railroad company shall first file in the office of the Secretary of State of the state of Minnesota, a true copy of its articles of organization, or incorporation, duly certified as such by the secretary of state of the

state of its original incorporation, and shall comply with the laws of the state of Minnesota as to filing and recording its said articles of organization or incorporation by causing a certified copy thereof to be recorded in the office of said secretary of state of the state of Minnesota and a like certified copy of said articles to be recorded in the office of the register of deeds, of the county where the principal place of business of said railroad company is to be located in this state, and shall keep an office in this state in the same county, or some one of the counties, in or through which its railroad is, or is proposed to be built, and shall be liable to civil process, to be sued and to sue as provided by law.

Sec. 2. That upon and from the filing of its said articles of incorporation as above provided, which shall be deemed to be an acceptance of the benefits of this act, the said corporation is hereby declared to be a legal domestic corporation of this state."

General Laws 1903, Chapter 253.

"Section 1. Every railroad company owning or operating any line of railway situated within, or partly within, this state, shall during the year 1905, and annually thereafter pay into the treasury of this state in lieu of all taxes and assessments upon all property within this state, owned or operated for railway purposes by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to four (4) per cent of the gross earnings derived from the operation of such line of railway within this state; and the annual payment of such sum shall be in full and in lieu of all other taxes and assessments upon the property and franchises so taxed. The lands acquired by public grant shall be and remain exempt from taxation until sold or contracted to be sold,

or conveyed, as provided in the respective acts whereby such grants were made or recognized.

Sec. 2. The term 'the gross earnings derived from the operation of such line of railway within this state' as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state.

Sec. 3. All acts and parts of acts not inconsistent herewith regulating the payment, collection, time of payment, enforcement or reports involving the amount of taxes upon the gross earnings of railroad companies within this state, or providing penalties for the nonpayment of such taxes, are hereby made applicable to this act so far as may be; and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 4. Upon failure to pay the amount of such taxes legally due upon the date heretofore provided by law for the payment thereof, in addition to existing remedies, collection may be enforced in a civil action brought in the name of the state of Minnesota in the district court of any county.

Sec. 5. Before any railroad company shall be heard to contest or continue to contest the validity of this act or any part thereof, such railroad company shall as a condition precedent thereto, pay into the treasury of the State of Minnesota, the amount of taxes due or payable from such railroad company under the existing tax laws of this state applicable to such company."

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 359.

Office Supreme Court, U. S.
OCT 29 1909
JAMES H. McKENNEY,

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

STATE OF MINNESOTA,
Defendant in Error.

On Writ of Error to the Supreme Court of Minnesota.

ARGUMENT FOR DEFENDANT IN ERROR.

GEORGE T. SIMPSON,
Attorney General.

GEORGE W. PETERSON,
Assistant Attorney General,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 359.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

STATE OF MINNESOTA,
Defendant in Error.

On Writ of Error to the Supreme Court of Minnesota.

STATEMENT OF THE CASE.

The above entitled action was originally brought in the district court of Ramsey county, Minnesota, in June, 1906, to recover of the Great Northern Railway Company, a corporation, the sum of One Hundred Twenty Thousand, Seven Hundred Thirty-seven and 38/100 ($120,737.38) dollars, which sum was one per cent of the gross earnings of said company during the year 1905. The said company

had already paid three per cent of its gross earnings covering said year. The action on the part of the state was predicated upon Chapter 253, General Laws of Minnesota for the year 1903, which provided generally that all railroads in the state, beginning with the year 1905, should pay a tax of four per cent upon their gross earnings.

The Great Northern Railway Company in its answer alleged that its line from St. Paul to Breckenridge, formerly known as the Main Line, and its line from East Minneapolis (formerly St. Anthony) to St. Vincent, (of which that part from St. Anthony to Watab (East St. Cloud) was formerly known as the Branch Line and that from East St. Cloud to St. Vincent was formerly known as the Extension Line or St. Vincent Extension, and all operated under a lease from the St. Paul, Minneapolis & Manitoba Railway Company,) together with certain branches, were built and have always been operated by virtue of the provisions of the charter of the Minnesota & Pacific Railroad Company and the acts amendatory thereof; that the last named company was exempt from all assessments and taxes whatever upon the payment of three per cent of its gross earnings; that by virtue of various enumerated mortgage foreclosure proceedings and purchases at foreclosure sales and of chapter 30, Laws 1876, and chapter 49, Laws 1879, the Manitoba Company became invested in respect of each of the lines purchased "with all and singular the franchises, rights, powers, privileges and immunities theretofore granted to or possessed by the cor-

poration making such mortgage or deed of trust" to the same extent as if the same had been originally conferred upon such purchaser, and still possessed the same contract rights which were theretofore possessed by the Minnesota & Pacific Railroad Company, the St. Paul & Pacific Railroad Company and the First Division of St. Paul & Pacific Railroad Company in respect to the payment of three per cent of gross earnings in lieu of all other taxes under the contract whose terms are stated in the act of May 22, 1857. It further alleged that it had paid on said leased lines of road the amount of the three per cent tax on their gross earnings for the year 1905, as required by the act of May 22, 1857. It alleged that the amount claimed was one per cent of their gross earnings and was claimed solely by virtue of Laws 1903, chapter 253, and that the act was void as to plaintiff in error in that it impaired the obligation of the contract contained in the act of May 22, 1857, and so violated Section 10 of Article 1 of the Federal Constitution and Section 11 of Article 1 of the Minnesota Constitution.

Upon the trial of the cause in the district court of Ramsey county, Minnesota, a stipulation of facts was entered into, (Trans. p. 27, et seq.) which stipulation became a part of the trial court's findings of fact, (Trans. pp. 331, 30-60).

The trial court directed judgment in favor of the State of Minnesota for one per cent of the gross earnings of the said plaintiff in error covering sixteen branch lines of said company, holding in effect that the immunity from taxation in excess of three

per cent of the gross earnings does not apply to the branch lines built or owned by the Manitoba Company, and eased to plaintiff in error. (Trans. p. 335.)

By stipulation the amount of taxes which the state was entitled to upon the earnings of said branches, was fixed at Thirty-two Thousand, Two Hundred Eighty-five and 95/100 ($32,285.95) dollars, (Trans. p. 342), and judgment was duly entered in the district court of Ramsey county, September 12, 1908, in the sum of Thirty-two Thousand Six Hundred Thirty-two and 55/100 ($32,632.55) dollars. (Trans. p. 343.)

The trial court held in effect,

(a). That the charter of the Minnesota and Pacific Railroad Company, which was granted by territorial enactment in 1857, and prior to the admission of the state into the Union, and the adoption of the state constitution, was not affected or controlled by the several provisions in the state constitution against special forms of taxation.

(b). That the original charter of the Minnesota & Pacific Railroad Company providing for the payment of a gross earnings tax in lieu of all other taxation of its property, constitutes a valid, irrepealable contract between the State of Minnesota and the company.

(c). That the immunity from taxation in said charter in excess of three per cent of the gross earnings of the railroad applies to the "original lines" described in said charter.

(d). That the Great Northern Railway Company succeeded to all the rights and immunities of the Minnesota & Pacific Railroad Company, including this exemption from taxation, in excess of three per cent of its earnings on its original lines. (Trans. pp. 333, et seq.)

The original lines of the plaintiff in error, in the holding of the trial court, covered the so-called Main, Branch, and Extension lines above referred to.

Both parties appealed from the judgment of the district court of Ramsey county to the supreme court of Minnesota. The State of Minnesota urged in the supreme court of Minnesota the following assignments of error of the district court of Ramsey county:

ASSIGNMENTS OF ERROR.

The District Court erred:

First.

In not holding, as a matter of law, that plaintiff (defendant in error) was entitled to, and in not ordering judgment for one per cent of the gross earnings for 1905 of the so-called "extension line" from St. Cloud to St. Vincent, in addition to one per cent of the gross earnings for 1905 of the sixteen branch lines, because the said "extension line" was not covered by the Minnesota and Pacific charter, and because the three per cent gross earnings

tax provision of said charter could not be extended to any line outside of the original franchise, and authorized only by subsequent enactment of the State Legislature.

Second.

In not holding as a matter of law that the plaintiff (defendant in error) was entitled to, and in not ordering, judgment in its favor for the entire sum of $120,737.38 for the following reasons, to-wit:

(A) Section eighteen of the Act of May 22, 1857, the Minnesota and Pacific Charter, establishing the straight three per cent gross earnings tax, was repealed and superseded by the third provision of Section 1, of the Act of March 2, 1865, establishing the graduated tax of one, two and three per cent. By the acceptance of this law by both the St. Paul and Pacific and the First Division Companies, the old contract, if it was a contract, was repealed by the State Legislature and abandoned by the Railroad Companies, and the new agreement was entered into, which, if it still exists, is subject to amendment.

(B) The three per cent gross earnings tax provision of the Minnesota and Pacific Charter was personal to that company, and could not be transferred, after the adoption of the State Constitution to any of its successors.

(C) Even though, as to the original companies, the three per cent gross earnings tax privilege was appurtenant to the road, it could not and did not

pass to the Manitoba Company in 1879, because that Company was legally incompetent to receive such a privilege of immunity, for it was a new corporation, subject to all the laws in force at its organization, especially the Constitutional Amendment of 1871 (Article 4, Section 32a), which in effect provided that all railroad gross earnings tax laws should be subject to amendment and repeal.

(D) Even though there was a contract right to the three per cent gross earnings tax, and the accompanying exemption from ordinary taxation, it was lost by the extension of the road into other states, and by the consolidation with the Eastern Minnesota line and the Great Northern system in 1902.

(E) The Supreme Court of Minnesota has never held a Territorial Charter exemption from taxation to be generally appurtenant to any line of railroad so as to pass therewith to a company which had not undertaken to construct or complete, and which did not construct and complete, the road covered by the charter, and to secure the construction of which the same was granted. In so far as the exemption has been held an appurtenance it has never been held to be such as an irrepealable contract right.

(F) Even though by the former decisions of the Minnesota Supreme Court it had been held that any provision of the gross earnings tax laws was appurtenant generally and as an irrepealable contract to any line of railroad, such decisions ought

not to be controlling under the rule of *"stare decisis,"* because such decisions, so construed, would be clearly erroneous.

The errors assigned by the plaintiff in error on its appeal to the supreme court of Minnesota are set out in the transcript on pp. 8-10, and raised generally all the questions presented by the errors assigned by the plaintiff in error in this court.

The supreme court of Minnesota sustaining the contention of the State, held that,

> "Chapter 253, Laws of 1903, approved at the general election of 1904, as provided by section 32a of article 4 of the state constitution, increasing the rate of the gross earnings tax of railroad companies doing business in this state to four per cent, is valid as to defendant (plaintiff in error) and all its lines of road and branches thereof. The statute impairs no contractual or other vested right of defendant (plaintiff in error), and is not repugnant to either the state or the federal constitution."
>
> "First Division St. Paul & P. R. Co. v. Parcher, 14 Minn. 224 (297), and other similar cases, distinguished."
>
> (Trans. p. 345.) (106 Minn. 303.)

(a) THE MATERIAL FACTS MORE IN DETAIL ARE AS FOLLOWS:

The Minnesota & Pacific Railroad Company was incorporated under and pursuant to Chapter 1, Territorial Laws 1857, entitled:

> "An act to execute the trust created by an act of Congress entitled: 'An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the state of Alabama to aid in construction of a

> certain railroad in said state, and granting certain lands to railroad companies therein named,'" approved March 22, 1857. (Trans. pp. 32, 97-109,346.)

Said Minnesota & Pacific Railroad Company by section 2 of the charter was authorized to construct and operate a railroad,

> "from Stillwater by way of St. Paul and St. Anthony via Minneapolis to the town of Breckenridge * * * *with a branch* from St. Anthony via Anoka, St. Cloud and Crow Wing to St. Vincent, near the mouth of the Pembina river."

It is here to be noted that the only portions of the Manitoba system, to which the plaintiff in error claims to have succeeded, expressly authorized to be constructed by the charter of the Minnesota & Pacific Railroad Company, are the lines from St. Paul to Breckenridge, hereinafter referred to as the "Main Line," and that from St. Anthony (East Minneapolis) to St. Cloud (Sauk Rapids), hereinafter referred to as the "Branch Line." (Exhibit A, Trans. p. 42.)

No line was ever constructed via Crow Wing to St. Vincent. The line from St. Cloud to St. Vincent, called the Extension Line was constructed under the authority of an act of the state legislature, approved March 6, 1869, whereby (Section 1), authority was granted to construct the line as a "Branch Railroad." (Trans. p. 172). The grant covered by said act was subject to the constitution of the state, both as to the state and the company.

By sections seven, thirteen and twenty-one of the

charter of the Minnesota & Pacific Railroad Company, references are made to the railroad and its *branches* (Trans. pp. 99, 100, 101, 107), but the references are by way of recital and not of grant, with a clear limitation to such construction as is authorized in section 2, supra. Attention is also directed to section 25, under which authority was given for the construction of a railroad from Winona up the valley of the Mississippi to St. Paul, and for the extension of the line from its terminus between the foot of Big Stone Lake and the mouth of the Sioux Wood river (Breckenridge) to any point on the Missouri river north of the forty-fifth parallel of north latitude.

Section 18 of the act of May 22, 1857, is the alleged irrepealable contract and reads as follows:

> "In consideration of the grants, privileges and franchises herein conferred on said Minnesota and Pacific Railroad Company the said company shall and will, on or before the first day of March in each year, pay into the treasury of the territory or future state three per centum of the gross earnings of the said railroad for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever; * * * and for securing to the territory or state the payment of the aforesaid per centum it is hereby declared that the state shall have a lien upon the railroads of the said company and upon all other property, estate and effects of the said company, whether real, personal or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company. The first payment shall be made on the first day of March next after fifty miles of said railroad shall be com-

pleted, and such payment shall be in lieu of all taxes and in full of all claims of the territory or state for the grant hereby made; and in consideration of such annual payment the said company shall be forever exempt from all assessments and taxes whatever, by the territory or state which shall succeed the territory, or by any county, city, town, village or other municipal authority in the territory or state upon all stock in the said Minnesota and Pacific Railroad Company, whether belonging to said company or to individuals and upon all its franchises or estate, real, personal or mixed, held by said company, and said land granted by said act of Congress hereby authorized to be conveyed to said Minnesota and Pacific Railroad Company shall be exempt from all taxes till sold and conveyed by said company."

(Trans. pp. 105-106.)

It is to be noted that the provision covered the Minnesota and Pacific Company, not said Company, its successors and assigns.

The Minnesota and Pacific Company duly accepted the act of May 22, 1857 (Trans. pp. 109, 110).

On July 31, 1858, the said company mortgaged by deed of trust its railroad property and franchises to Elon Farnsworth and others, to secure the payment of certain indebtedness. (Trans. pp. 33, 110, 111-125, 247, 346). A supplement to said mortgage was executed on November 27, 1858, to the said parties to secure the State of Minnesota, the holder of a portion of the bonds of said company, the state having under and pursuant to the constitutional amendment of April 15, 1858, issued its bonds in the sum of $600,000 in aid of said railroad in exchange for the bonds of said company. (Trans. pp. 33, 134-137).

The company failed to complete said lines of railroad, made default in the mortgage and the supplement to the same, and the property and franchise were foreclosed on June 23, 1860, and purchased by the State of Minnesota. (Trans. pp. 34, 136-147).

On March 8, 1861, the legislature of the State of Minnesota enacted a law entitled "An act to facilitate the construction of the Minnesota & Pacific Railroad." (Trans. pp. 34, 148-150). The company failed to perform the conditions of said act, and pursuant to the terms thereof, the said property and franchise privileges were forfeited to the state. (Trans. pp. 34, 148-150.)

On March 10, 1862, the legislature of the State of Minnesota enacted a law entitled,

> "An act to facilitate the construction of the Minnesota & Pacific Railroad, and to amend and continue the act of incorporation, relating thereto."

Under and pursuant thereto the old charter and its franchise privileges were regranted, insofar as the state was competent so to do, to Dwight Woodbury, and others, a corporation under the name of the St. Paul & Pacific Railroad Company. (Trans. pp. 150-155.)

In respect of the competency of the State to regrant said charter, be it remembered that the Constitution of the State had been adopted on October 13, 1857, and the State admitted to the Union on May 11, 1858. By sections one and three of Article IX of the Constitution, it was provided that all property on which taxes were to be levied should

have a cash valuation, be equalized and uniform throughout the State, and laws should be passed taxing all property, real and personal, according to its true value in money. Certain specified classes of property were exempted from taxation, railroad property not being included. Under and by virtue of said constitutional provisions the several state statutes taxing railroads on a gross earnings basis passed thereunder were held invalid. By the Constitutional Amendment of 1871, Article IV, Section 32a, such laws were, however, validated, such validation being a qualified one, the right to repeal or amend such statutes being reserved. State ex rel Marr v. Stearns, 72 Minn. 200.

On February 6, 1864, the legislature of Minnesota passed an act entitled,

> "An act to amend the charter of the St. Paul & Pacific Railroad Company."

Under the terms of said act authority was given for the organization of the First Division of the St. Paul & Pacific Railroad Company. (Trans. p. 155). The First Division Company was the first to put into operation any line of railroad and the first to pay taxes to the state, a thirty-mile section of its road having been completed on November 7, 1864. (Trans. pp. 36-37.)

On March 2, 1865, there was enacted by the legislature of Minnesota an act entitled,

> "An act to facilitate the completion of the St. Paul & Pacific Railroad and branches."

Without any reference to the Minnesota and Pacific Charter it covered in detail the entire matter of taxation, and instead of the straight three per cent tax provided for a graduated system.

The act of March 2, 1865, provided:

> "That in consideration of an annual payment of a per centum as provided in this section by said corporation as aforesaid, the railroad, its appurtenances and appendages and all other property, estate and effects of said corporation which by the provisions of this act contained said corporation is to acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all taxation and from all assessments; and in consideration of the grants made to and the privileges and franchises conferred upon the company hereby created, and of the exemption contained in this section the said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year pay into the treasury of the state one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after the said railroad shall be completed and in operation; and shall during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this state on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad, and shall from and after the expiration of ten years from the completion of thirty miles of said railroad, on or before the first day of March of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad, and the pay-

ment of such per centum annually as aforesaid shall be and is in full of all taxation and assessment whatever.

And for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasury of this state on or before the first day of February in each year, the truth of which abstract shall be verified by affidavits of the treasurer and secretary of the company; and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstract full power is hereby vested in the Governor of this state or any other person appointed by law prescribed, to examine under oath the officers and employes of said company or other persons; and if any person so examined by the Governor or other authorized persons shall knowingly or wilfully swear falsely concerning the matter aforesaid every such person is declared to have committed perjury."

"And for securing to the state the payment of the aforesaid per centum it is hereby declared that the state shall have a lien upon the railroad of said company and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company; provided further, that the lands of said company shall be subject to taxation as soon as sold, leased or contracted to be sold or leased."

(Trans. pp. 167-168.)

For the first three years after the completion of thirty miles of road (instead of fifty miles, as in the act of 1857), one per cent was to be paid; for the next seven years the tax was two per cent, and only after the expiration of this period of ten years

did a three per cent gross earnings tax accrue. Attention is also called to the act of March 4, 1865, which modified the act of March 2, 1865, to the extent of making the grant of lands taxable only as to the interest of the purchaser or lessee after said lands were leased or contracted to be sold. (Trans. p. 169). The St. Paul & Pacific Company accepted in writing the acts of March 2 and March 4, 1865. (Trans. pp. 35, 170). The First Division Company accepted the act of March 4, 1865. (Trans. p. 171). It is expressly stipulated (Trans. p. 37, 42) that the First Division Company complied with the provisions of the act of March 2, 1865. It accordingly never complied with or adopted the Minnesota & Pacific Charter of 1857. It elected, rather, to adopt the new law of March 2, 1865, and by such adoption section 18 of the charter of 1857 was abandoned, and superseded by the law of March 2, 1865. The First Division Company paid the graduated tax provided by the act of March 2, 1865, for the first ten years after the completion of thirty miles of road. *There was then no other law under which a graduated tax could be imposed.* Accordingly it is urged on behalf of the state that the act of March 2, 1865, being a complete substitute for the act of 1857, so far as concerned taxation, was a repeal thereof, and that, as such it was accepted and adopted by the St. Paul & Pacific and the First Division Companies. A controlling *fact* in this connection is that in 1877 in C. M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217, and again in 1886, in State v. N. P. Ry. Co., 36 Minn. 207 (209),

the Supreme Court of Minnesota held that the act of March 2, 1865, applied to all lines "constructed and operated by the St. Paul & Pacific Railroad Company, or by any company deriving from that corporation and under the peculiar provisions of its charter, a separate corporate existence."

The First Division Company continued the construction work and completed the main line to Breckenridge in 1871, and the branch line to Sauk Rapids in 1867. (Trans. p. 29). The St. Paul & Pacific Company built the extension line from St. Cloud to St. Vincent. That portion extending from East St. Cloud to Melrose, thirty-two miles, was not completed until November 1, 1873. (Trans. p. 29); the remainder was completed by 1879.

Thus far there is a certain continuity of existence between the Minnesota & Pacific, the St. Paul & Pacific, and the First Division Companies, the alleged predecessors in interest of the plaintiff in error. It will be observed that there was no such connection between either of the old companies and the St. Paul, Minneapolis & Manitoba Railway Company, which is next to be considered. The Manitoba Company was organized in 1879 (eight years after the adoption of the constitutional amendment validating the gross earnings tax laws, and reserving to the state the right to repeal or amend them by law approved by popular vote), and in that year said company acquired all the properties of the Minnesota & Pacific, the St. Paul & Pacific, and the First Division Companies at foreclosure sales. (Trans. p. 348.)

The state insists that the Manitoba Company came into being subject to the laws as it found them, and that said company could not violate those laws by succeeding to an irrepealable immunity from taxation in contravention of the constitutional amendment of 1871. The same rule obtains, it is submitted, even against the St. Paul and Pacific and First Division Companies.

Since the year 1879, under the authority of state laws of the same nature as the act of March 6, 1869, (Trans. p. 172 et seq.), the Manitoba Company has constructed sixteen "Branch Lines" enumerated in the order of the District Court. (Trans. p. 335.) These "Branch Lines" with the old "Main," "Branch" and "Extension" lines, constitute the so-called Manitoba system now alleged to be immune from an increase in the rate of its gross earnings tax.

In 1890, the Manitoba Company turned over to the plaintiff in error all of its lines and equipment under the so-called lease for nine hundred and ninety-nine years (Trans. p. 44). In 1902 the lines of road then owned and operated by the Eastern Minnesota Company were in a similar manner *leased* for a period of ninety-nine years to the plaintiff in error (Trans. p. 28). Since 1902 the Manitoba & Eastern Minnesota lines, with other branches and extensions, extending to the west across the continent, have been operated together as the Great Northern system. The four per cent. tax for the year 1905 has been paid on the Eastern Minnesota lines.

Attention is particularly called to the following points, which the state claims are established beyond contradiction:

1. The only portions of the Manitoba system expressly authorized by the Charter of 1857 are the line from St. Paul to Breckenridge, hereinafter referred to as the "Main Line," and that from Minneapolis (St. Anthony) to Sauk Rapids, hereinafter referred to as the "Branch Line."

2. So far as concerns taxation, the charter of 1857 was repealed and superseded by the Act of March 2, 1865. Neither the plaintiff in error, the Manitoba Company, nor any of their predecessors, have ever paid a dollar of taxes under the Act of 1857. On the contrary, until 1905, they have always complied with and paid taxes under the Act of 1865.

3. There is no language in the Act of 1857 which was effectual to transfer, or authorize the transfer of, the 3% tax provision, as an irrepealable contract, to any successor of the Minnesota & Pacific Company.

4. The Manitoba Company is a Minnesota corporation, organized under the general laws of the state in 1879, or eight years after the adoption of the Constitutional Amendment of 1871, which in effect validated all gross earnings tax laws enacted prior thereto, but made them subject to amendment or repeal.

5. The lines covered by the charter of 1857 have become merged in the Great Northern system, extending out of the state and across the continent to the west.

These five propositions are numbered to correspond with the points of argument under which their bearing upon the case at bar is considered. Other facts appearing in the record will be referred to under the appropriate points in the brief. Attention in conclusion is called to the terms of Chapter 253 of the Laws of 1903, which act the plaintiff in error claims has violated its irrepealable contract rights, by which it is provided:

> "Sec. 1. Every railroad company owning or operating any line of railway situated within or partly within this state shall, during the year 1905, and annually thereafter, pay into the treasury of this state in lieu of all taxes and assessments upon all property within this state owned or operated for railway purposes by such company, including the equipment, appurtenances, appendages and franchises thereof, a sum of money equal to four per cent of the gross earnings derived from the operation of such line of railway within this state; and the annual payment of such sum shall be in full and in lieu of all other taxes and assessments upon the property and franchises so taxed. The lands acquired by public grants shall be and remain exempt from taxation until sold or contracted to be sold or conveyed, as provided in the respective acts whereby such grants were made or recognized.
>
> Sec. 2. The term 'gross earnings derived from the operation of such line of railway within this state' as used in section one of this act is hereby declared and shall be construed to mean all earnings on business beginning

and ending within the state and a proportion based upon the proportion of the mileage within the state to the entire mileage over which such business is done of earnings on all interstate business passing through, into or out of the state."

The effect of this statute is to place the plaintiff in error on the same basis of taxation as all other railroads in the state.

ARGUMENT.

I.

THE THREE PER CENT GROSS EARNINGS TAX PROVISION OF THE MINNESOTA & PACIFIC CHARTER APPLIES ONLY TO THE LINES EXPRESSLY AUTHORIZED THEREBY.

The only authority granted by the laws of 1857 was for the building of a road "from Stillwater by way of St. Paul and St. Anthony, via Minneapolis, to the Town of Breckenridge, • • • *with a branch* from St. Anthony via Anoka, St. Cloud and Crow Wing, to St. Vincent," (Trans. p. 97), and for a railroad from Winona up the Valley of the Mississippi to St. Paul. (Trans. 109.)

The authority thus given was a restricted one, which cannot now be extended as against the rights

of the state. For its franchise for all additional lines, the plaintiff in error and its predecessors must look to laws passed by the legislature of the state, subject to the limitations of the Constitution.

The so-called "branch line" was never extended beyond Watab (East St. Cloud) under the original charter. The extension, when it was made, did not go via Crow Wing, but via Sauk Center, Fergus Falls and Barnesville, to St. Vincent, and was constructed under the authority of a state law, approved March 6, 1869. (Trans. p. 172.)

Therefore, the original charter authority, and the accompanying gross earnings tax provision, if the latter is to be considered as a contract applicable to any of the lines, must be restricted to the old main line from St. Paul to Breckenridge, and to the branch line from East Minneapolis to East St. Cloud.

As to any lines not constructed under the original charter, but authorized by subsequent state laws, and taxed upon the gross earnings basis, as all of them have been, the plaintiff in error must depend upon laws of the state, and not upon the charter granted by the territory in 1857, for authority for the gross earnings system of taxation. All such state laws were, at the time of their enactment, invalid, because unconstituional, and remained so until the validation thereof by the Constitutional Amendment of 1871 (Article 4, Section 32a).

This ratification of the gross earnings laws was

accompanied by a reservation of the power to amend. This proposition has been definitely settled.

State v. Luther, 56 Minn. 156;

State ex rel. Marr v. Stearns, 72 Minn. 200;

State v. Duluth & I. R. Ry. Co., 77 Minn. 433.

In the Stearns case it was said, on page 224:

> "That the statutes * * * were unconstitutional when enacted, and remained so until validated by the constitutional amendment of 1871. The legal effect of such amendment was to validate them * * *. But this ratification or validation of the statutes was a qualified one, and the right to repeal or amend them was reserved by necessary implication, provided such repeal or amendment was adopted or ratified by a majority of the electors."

(a) *An exemption from taxation contained in a railroad charter does not apply to extensions authorized by subsequent laws.*

When in view of this rule, we consider the fact that subsequent to 1858, the state constitution being adopted in that year, no valid law could be passed creating or extending to any part of any railroad the gross earnings system of taxation, we are led irresistably to the conclusion that the territorial charter relied upon by the plaintiff in error could not be and never was extended beyond the lines therein expressly authorized. This statement and conclusion is of course subject to this: Many such gross earnings laws were passed and afterwards ratified, with the reserved right of amendment, in 1871. This being the case, the state, in any view

of the situation, had the power to increase the rate of the gross earnings taxes as to any of the lines of the plaintiff in error not expressly covered by the Minnesota & Pacific Charter.

This precise proposition has been established by the Supreme Court of the United States.

Southwestern Ry. Co. v. Wright, 116 U. S. 231 (29 L. Ed. 626);

Wilmington and Weldon Ry. Co. v. Alsbrook, 146 U. S. 279 (46 L. Ed. 972).

The following quotation from the latter case, covering as it does the former, suffices to show the nature of the decision in both:

> "In Southwestern R. Co. v. Wright, 116 U. S. 231 (29:626) the question related to the liability of the railroad company for taxes on different parts of its road. The original charter contained an exemption from taxation, and as to two of the parts acquired or built under subsequent legislation, there was a reservation of the right to tax. A third division was constructed under an amendatory act giving authority so to do, 'under the rules and restrictions' originally prescribed, but containing nothing about taxation. As the original charter was not the source of power to build the division, it was decided that the exemption therein contained did not extend to the latter. Mr. Chief Justice Waite, delivering the opinion of the Court, said: 'In building this extension or branch the company was placed 'under the rules and restrictions' they were subjected to in building the original road; but that did not necessarily imply an exemption of this line from taxation to the same extent that the old road was exempted. That exemption was only for that road, and as the amending act does not in terms or by fair im-

> plication apply the exemption to the additional road, which was to be built under it, we must presume nothing of the kind was intended, and that the state was left free to tax that road like other property.'" Idem, p. 301.

Of course in Minnesota no "amending act" could have the effect to "apply the exemption to the additional road which was built under it," because all such amending acts were passed subsequently to the adoption of the State Constitution, under which they were invalid, remaining so until 1871.

In Chicago, B. & K. C. R. Co. v. Missouri ex rel. Guffey, 120 U. S. 569, 30 L. Ed. 732, the question was whether or not an exemption from taxation given by the charter of the St. Joseph & Iowa Railway Company extended to a branch road constructed under an act of 1868, this latter act being silent upon the question of taxation.

The Court said:

> "To say the least, it is not clear that the legislature intended that the exemption from taxation, given by such charters as that granted to the St. Joseph and Iowa Railroad Company, should be extended to branch roads constructed under the Act of 1868. As that statute does not grant immunity from taxation to roads constructed under its provisions, and as the system established by it is complete in itself without reference to other legislative enactments, the present claim to exemptions must be denied; for it is the settled doctrine of this Court that an immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken." Idem, pp. 574-5.

The case of Chesapeake & Atl. Ry. Co. v. Mayor of Ocean Grove, 89 Md. 89, furnishes another application of the same principle. It was held that an exemption from taxation given to the Baltimore and East Shore Railroad did not extend to another line subsequently purchased and consolidated therewith.

Since 1871 the state has had the power to provide for a gross earnings system of taxing railroads. Such a law is subject to amendment or repeal.

(b) *Prior to 1871 the State did not have the power, possessed by the Territory, of creating a commuted system of taxation. Not having the power to create, it could not extend or enlarge such a system.*

Therefore, there was no way whereby the 3 per cent. gross earnings tax provision of the Minnesota and Pacific charter could be extended or enlarged so as to include any lines not expressly authorized thereby.

In any view of the case, therefore, it is obvious that there was no three per cent, or other gross earnings tax law constitutionally applicable to any of the Manitoba lines outside of those covered by the Territorial charter, until the adoption of the Constitutional Amendment in 1871. This validated the gross earnings tax laws but reserved the power of amendment or repeal. An increase of the rate from 3% to 4% is a proper exercise of that power.

The learned Judge of the District Court of Ramsey County adopted the foregoing argument and

applied it to what he termed the "branch lines," and held them subject to the four per cent. tax. He excluded from the "branch lines," however, the road referred to for convenience as the "extension line," running from St. Cloud to St. Vincent. We insist that this road is as much beyond whatever protection there is in the three per cent. gross earnings section of the Territorial Charter as any of the other branches.

The charter of 1857 authorized a branch from "St. Anthony via Anoka, St. Cloud and Crow Wing to St. Vincent." This "branch" was completed as far as Sauk Rapids in 1867. (Trans. p. 29.) It has never been extended and Sauk Rapids remains its terminus.

Commenced in 1872 and completed in 1879, the so-called "extension line" was built, *not as an extension of the branch line,* but *"from a connection"* therewith (stipulation of facts, Trans. p. 29) at East St. Cloud.

The franchise for this road was granted by an Act of the Legislature approved March 6, 1869, entitled, "An Act to authorize the First Division of the St. Paul and Pacific R. R. Company to extend its branch line from St. Cloud via Sauk Center and Alexandria to the Red River of the North." (Trans. p. 172.)

By Section 1 the company was authorized to "survey, locate and construct a *branch railroad* from St. Cloud, via Sauk Center and Alexandria, to some point on the Red River of the North to be by said company designated."

It was by holding this act to be a mere regulation of the franchise already given for the continuation of the "branch line" from Sauk Rapids via Crow Wing that the learned trial judge differentiated the "extension line" from the other branches and relieved it of the four per cent. tax.

This conclusion flies directly in the teeth of the fact that the Act of March 6, 1869, was a new and independent grant, making no reference, express or implied, to the old franchise for the line from St. Anthony via Sauk Rapids and Crow Wing. If it was regulatory of the old franchise, or intended to have been a mere alteration thereof, the same would have been mentioned. Not only is there nothing in the new act to brand it as a mere regulation of or change in the old, but there is not the slightest coincidence of the new line with the old. The route of the former was far to the south of the latter.

Under the old charter the road would have run from Sauk Rapids, via Crow Wing, to St. Vincent. Under the new law the road was to begin at St. Cloud and end at some point on the Red River designated by the company. There was no even a coincidence of terminal at either end.

Again the route from Watab (East St. Cloud) to Brainerd (which is not the same as the route from East St. Cloud to Alexandria) is recognized in *State v. N. P. Ry. Co., 36 Minn. 207*, as a part of the chartered line of the St. Paul and Pacific Company. Clearly both lines are not covered by the original charter.

That the Act of March 6, 1869, was a new and independent grant is conclusively shown by the provisions of Section 3. The company was thereby authorized to create special classes of stock and bonds applicable solely to the new branch and to manage the same as a "distinct separate interest" under a distinctive name of its own.

It therefore appears that the Act of March 6, 1869, was the sole "source of power" (Southwestern Ry. Co. v. Wright, *supra)* for the construction of the so-called "extension." It is therefore as much subject to the four per cent. tax as any of the other branches built solely under state authority.

It is only by the broadest kind of implication in favor of the railroad company that the holding to the contrary can be sustained at all. But this is not a case for implying anything against the State's right to tax. Under the rule of strict construction, to which we will hereinafter refer at greater length, all implications must be in favor of the State.

Plaintiff in error relies upon a strained interpretation of the charter to authorize the construction of branch lines, meaning thereby the sixteen branch lines covered by the trial court's findings of fact. (Trans. p. 331.) As authorizing the construction of branches counsel calls attention to the act, Section 7, providing as follows:

> "The said company shall have the right and authority to construct their said railroad and branches upon and along, across, under or over any public or private highway, road, street, plank road or railroad, if the same shall be necessary." (Trans. p. 99.)

The State contends that the subject of said section, as quoted, refers to the right of the Minnesota & Pacific Company to construct its railroad along, across under or over roads, streets and railroads, when necessary. It does not define what road and branches, if any, are authorized. It is not a source of power to construct branches.

Again counsel quotes:

> "Said company shall have power to connect the said railroad or branches with any other railroad or branch thereof in this territory or state, or in the state of Wisconsin, and to operate the same in connection with such other railroad or branch under such name and on such terms as may be agreed upon by and between said companies, or to purchase from any other railroad company the whole or any part of any railroad or branch railroad owned by such company."
>
> (Trans. pp. 99, 100.)

The subject matter of the quoted section is connections with other railroads, operating agreements, and the purchase of other roads. Stillwater, which is the beginning of the main line, so called, as authorized, is on the Minnesota side of the St. Croix river, the boundary between Minnesota and Wisconsin. Seemingly a connection with a railroad in Wisconsin might thus be contemplated; or a connection with a Wisconsin railroad running into Minnesota. The mere right to purchase a railroad would not carry with it the immunity from taxation in Section 18 as to the purchased road.

S. W. Ry. Co. v. Wright, *supra*.

In Section 13 the words railroad and branches are also used in connection with the subject matter of condemnation. In Section 21 the words railroad or branches are used in connection with the power to mortgage. It seems clear that we must recur to the granting clauses, Sections 2 and 25, to ascertain what is granted. Quite probably the term branches is used to denominate the branch line specifically authorized by Section 2, and the line from Winona to St. Paul, and the extension authorized by Section 25; in short, the roads other than the main line, so called.

Chapter 31, G. L. 1881, authorizing branch lines, as well as all other acts, special or general, authorizing branches, passed by the State could not constitutionally grant the immunity from taxation without the right to repeal or amend. The matter is resolved exclusively to roads authorized by the charter.

Again the capitalization originally authorized by the Charter, $5,000,00, with the right to increase to $20,000,000 (Sec. 4), hardly suffices when the aggregate mileage of the sixteen branches, 753.13 miles (Trans. 335) is noted, as against the mileage of 602.59 miles of the main, branch and extension lines. (Trans. pp. 29-31, 32, 346, 347.) The main, branch and extension lines were mortgaged for $21,134,000. (Trans. pp. 178-196, 205-223, 228-248.)

II.

SECTION 18 OF THE ACT OF MAY 22, 1857, ESTABLISHING THE STRAIGHT THREE PER CENT. GROSS EARNINGS TAX, WAS REPEALED AND SUPERSEDED BY THE THIRD PROVISO OF SECTION 1 OF THE ACT OF MARCH 2, 1865, ESTABLISHING THE GRADUATING TAX ON ONE, TWO AND THREE PER CENT. BY THE ACCEPTANCE OF THIS LAW BY BOTH THE ST. PAUL AND PACIFIC COMPANY AND THE FIRST DIVISION OF THE ST. PAUL AND PACIFIC COMPANY, THE OLD CONTRACT, IF IT WAS A CONTRACT, WAS ABANDONED AND A NEW ONE ENTERED INTO, WHICH IS SUBJECT TO AMENDMENT.

In view of the fact that this court will independently determine the existence of a contract, and, if it exists, the terms thereof, the following is deemed pertinent:

That the Act of March 2, 1865, together with the Act of March 4th, was accepted by the St. Paul and Pacific Company is admitted by the stipulation. (Trans. p. 35.) While it is not so stated, it is apparent that this acceptance was intended to be made, and was considered to have been made, on behalf also of the First Division Company. The law itself expressly applies to the lines of the First Division for they were the only lines then in existence and were certainly "portions of the line of railroad of the St. Paul and Pacific Railroad Company as now fixed by law." (Section 1, Trans. 166). The First Division Company was then

building the line from Elk River to St. Cloud and owned the line on First street in St. Anthony, both of which lines are mentioned in Section 1. The provisions of Section 2 relative to the land grants are obviously for the benefit of all the lines of the St. Paul and Pacific System, including those of the First Division Company.

That the acceptance was for the benefit of the First Division Company, and that it was made on its behalf, is shown by the fact that it paid its taxes thereunder and never paid taxes under any other law.

The stipulation (Trans. p. 37) states that all the companies have fully complied with all the provisions of said Act of March 2, 1865, in respect to the returns of gross earnings and the payment of taxes thereon. It also states that the First Division paid taxes at the rate of one per cent. during the first three years after the enactment of the law and at the rate of two per cent. during the next seven years, and at the rate of three per cent. thereafter. (Trans. p. 37.) There was no other law under which this graduated tax was payable, and therefore, without the admission of the stipulation (Trans. p. 37), it is shown conclusively that the First Division Company did accept the law and all its benefits.

Our Court has twice decided (in 1876 and again in 1886) that the Act of March 2, 1865, was applicable to all lines "constructed and operated by the St. Paul & Pacific Railroad Company *or by any company deriving from that corporation, and un-*

der the peculiar provisions of its charter a separate corporate existence."

Chicago, Milwaukee & St. Paul Ry. Co. v. Pfaender, 23 Minn. 217;

State v. N. P. R. R. Co., 36 Minn. 207 (209).

"While repeals by implication are not favored," says Mr. Justice Jaggard, in Clark v. Baxter, 98 Minn. 256 (258), "it is also true that even if the subsequent statute be not repugnant in all its provisions to a prior statute on the same subject, *yet if the former was clearly intended to prescribe the only rule which should govern in the case provided for, it repeals the original act by implication.*" Citing Nicol v. St. Paul, 80 Minn. 415; Sutherland Statutory Construction, Section 154.

It is too plain for argument that, not only by the legislature, but also by the two companies for whose benefit the law was passed, the gross earnings tax proviso of the Act of March 2, 1865, was intended "to prescribe the only rule which should govern in the case provided for," that is, the taxation of the properties of said companies. It was, therefore, an implied but complete repeal of Section 18 of the Charter of May 22, 1857.

Not only did it cover the entire subject matter of the former law, thereby and for that reason alone repealing it by implication, but it also prescribed a new and different rule and system. The rights of the State were entirely changed and the obligations of the companies were as completely altered.

The old contract, if it was such, was cancelled and a new one substituted and this substituted

contract thereafter governed all of the parties thereto.

The circumstances were ripe for a new arrangement between the company and the State. The Minnesota and Pacific Company never earned any of the franchises or privileges granted to it. It was continuously in default, as was also the successor, the St. Paul and Pacific Company, up to 1865. No taxes were ever paid by the Minnesota and Pacific Company, nor by any company, prior to the first payment by the First Division Company under the law of 1865. Railroad building was progressing slowly and repeated statutory extensions of the time within which the roads were to be built were necessary. At any time between 1858 and 1865, the State could have withdrawn all of the franchises and privileges granted to the several companies. This was the condition existing when on March 2, 1865, at the instance undoubtedly of the companies themselves, and at a time when they would have been glad to accept almost any new and easier arrangement, the new contract for a graduated gross earnings tax was entered into and the old one was abrogated. It cannot be supposed for an instant that the First Division Company was not a party to the arrangement whereby for the first ten years of its active railroad operation, it was relieved from the payment of the three per cent. tax and in lieu thereof was obligated to pay one per cent. for the first three years, and two per cent. for the next seven years.

It will be urged that the Act of March 2, 1865,

was unconstitutional and therefore that it could not have the effect of repealing the Act of 1857. This is a *non sequitur* for two reasons. First, the repealing act was validated by the Constitutional Amendment in 1871. Second, the company was paying and the State receiving taxes under this law, at the rate of two per cent. in 1871, when the Constitution was amended. It was the law which then governed them and necessarily the law upon which the amendment operated with its confirming and validating force. The distinctive feature of the newer law, the graduated tax, was apparent until and including 1875. It was over four years after the amendment before the St. Paul and Pacific and First Division Companies ceased paying the two per cent. permitted by the Act of March 2, 1865. (Trans. p. 37)

See C. St. P. & M. Ry. Co. v. Pfaender, 23 Minn. 217 (225-6).

From these facts it is obvious that the companies prior to the four per cent. law, always paid taxes under the law of 1865 and not under that of 1857. The law of 1865, although originally unconstitutional, was adopted by the railroad companies, was validated by the Constitutional Amendment of 1871 and now, by reason of the effect of that amendment, is subject to amendment by increasing the rate to four per cent.

The Supreme Court of Minnesota in the case at bar uses the following language, and places the following construction upon the Act of March 2, 1865, to-wit:

"However, by Chapter 6, page 40, Special Laws 1865, an act to facilitate the completion of the St. Paul and Pacific Railroad and branches, the legislature imposed a different rate of taxation than that contained in the Minnesota and Pacific Company's charter, in this: That by this act the company was required to pay during the first three years, after thirty miles of its road had been completed, one per cent. of its gross earnings, two per cent. during the succeeding seven years, and thereafter three per cent. The act also contained a provision that the lands of the company shall be subject to taxation as soon as sold, leased or contracted to be sold or leased. The St. Paul & Pacific Company formally accepted this act, and the First Division Company thereafter complied with its terms and provisions by paying the rate of taxation thereby imposed."

(Trans. p. 348.)

And again,

"The old Pacific and First Division Companies paid taxes to the State upon the basis of the Act of 1865, already referred to, viz: one per cent for the first three years after the completion of thirty miles of road, two per cent for the succeeding seven years, and thereafter, and until their rights passed from them by the foreclosure proceedings just refered to, at the rate of three per cent of their gross earnings." (Trans. p. 348).

And again:

"By Chpter 6, page 40, Special Laws 1865, the Legislature modified the original charter by providing for the payment of one, two and three per cent instead of a uniform rate of three per cent. This act was accepted by the St. Paul and Pacific Company, and acquiesced in by the First Division Company by a compliance with its provisions. By this modification

defendant's predecessors received and retained the benefit of an average annual reduction in their taxes of about forty per cent for the period of ten years." Trans. p. 351.

(a) THE REPEAL OF SECTION 18 OF THE CHARTER BY THE ACT OF MARCH 2, 1865, (AND THE ACT OF MARCH 4, 1865) IS QUITE ANALOGOUS TO THE SITUATION IN STATE v. LUTHER, 56 MINN. 156.

> "The first contention of the relator is that the lands are thus taxable by the terms of the proviso attached to Section 1, Special Laws 1865, Chapter 2, which is 'that said railroad lands shall be taxed as other lands in the state in five years after the said company shall become entitled to said lands.'"

On the other hand, the respondent claims that this proviso was repealed by Special Laws 1865, Ch. 8.

> "Chapter 2 was passed February 23rd, and Chapter 8, March 3rd, eight days later. The first was primarily a 'land grant act,' as indicated by its title, "An Act to execute the trust created by the Act of Congress," etc., although it also provided for a system or mode of taxation of the lands and other property of the railway company. The second act was exclusively a tax law, the title being "An Act in relation to the taxation of lands granted" to the railroad company.
>
> The system of taxation provided for in the first act was that the company should each year, "after said road is completed and in operation," pay into the state treasury three per cent of the gross earnings of the road * * * in lieu * * * of all taxation and assessment * * * provided, however, that such granted lands should be subject, like lands of individuals, to be taxed as fast as the same are

sold or conveyed or are leased by the company, or stumpage sold or contracted to be sold thereon. Had the act stopped here, then, clearly the lands would have remained exempt from taxation in the ordinary way as long as the company continued to own them, and had not contracted to sell them, or leased them, or sold stumpage. The proviso referred to was attached, limiting this exemption to five years from the time the company became entitled to the lands.

This method of taxation, for some reason, evidently proved unsatisfactory, for eight days afterwards the legislature, under suspension of the rules, and on the same day that the bill was introduced, passed chapter 8, revising the whole system of the taxation of the property and lands of the company. The system of taxation provided by this act was that, whenever any of the granted lands should be contracted to be sold, conveyed or leased, the same should be placed upon the tax list for taxation as other real estate, but that, in enforcing the collection of taxes thereon, only the improvements and interest of the purchaser or lessee should be sold, and that the title or interest of the company, or of any trustee or mortgagee, should not be affected. The effect of this, by necessary implication, was that until sold, contracted to be sold, or leased, the lands were to be entirely exempt from taxation in the ordinary way."

The act further provided that the company should, during the first three years after thirty miles of its road were completed and in operation, pay into the state treasury one per cent, and during the next seven years two per cent, and thereafter three per cent, of the gross earnings of the road, and that the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessment whatever. A repealing clause, usually found at the end of a statute, is found in the body of this

act, which provides that the provisions of the several acts (there were some prior to 1865) in relation to the taxation of lands of said company, so far as the mode of taxing such lands conflict with the provisions of this act, shall be and they are repealed. The extent and scope of this repealing clause is the chief point of difference between the parties. Does it repeal the "five-year" limitation in the act of February 23rd? is the question.

Counsel for the relator invokes two rules of construction: *First*, that repeals by implication are not favored; *Second*, that statutes granting exemption from taxation are to be constructed strictly in favor of the state. *Even conceding the applicability of these rules to the case, it seems to us perfectly apparent that as respects taxation, the second act was intended as a revision of or substitute for the first, and to prescribe the only rule on the subject. The second act covers all the ground covered by the first, making various changes, some in favor of the state, and others in favor of the company, although, as usual in those days, mostly the latter. And it is also perfectly clear to us that under the second act, even if the repealing clause was absent, the legislature intended that the granted lands should remain exempt from ordinary taxation as long as they continued to belong exclusively to the company.*" State v. Luther, 56 Minn. 156, 160.

III.

THE THREE PER CENTUM GROSS EARNINGS TAX PROVISION OF THE MINNESOTA & PACIFIC CHARTER, CONSIDERED AS A IRREPEALABLE CONTRACT, WAS PERSONAL TO THAT COMPANY, AND COULD NOT BE TRANSFERRED TO ANY OTHER CORPORATION, "SAVE BY A SPECIFIC ENABLING LAW COUCHED IN EXPLICIT LANGUAGE APT TO THE PURPOSE," AND THE CONSTITUTION DEPRIVED THE STATE OF THE POWER TO MAKE SUCH A LAW.

Let us first note the lack of "apt language" in the Minnesota and Pacific Charter, the Farnsworth mortgage (Trans. p. 111 et seq.) the deed of the state (Trans. p. 144) given on the foreclosure thereof and finally in the Five Million Loan Amendment of 1858 and the general law passed thereunder with respect to foreclosures on railroad property. In none of these is there any language sufficient to transfer from the Minnesota and Pacific to the State or to any other grantee the commuted tax privilege.

Section 21 of the Minnesota and Pacific Charter conferred the power, so far as we are now concerned, of mortgaging the whole, or any part of said railroad and branches and all corporate and other franchises, rights and privileges of said Company." The Farnsworth mortgage included "alienable franchises" only. (Trans. p. 116.) The deed to the State executed and delivered pursuant to the foreclosure of this mortgage referred to, described,

enumerated and conveyed "all the rights, lands, properties, privileges and franchises" described in the said mortgage. (Trans. p. 147.) The Five Million Dollars Loan Amendment authorized the giving of mortgages only on the "roads, lands and franchises" and provided for the foreclosure to the state of only the unearned lands and "franchises" of the defaulting company. Following the same restricted meaning, the legislature enacted a law, approved August 12th, 1858, concerning the land grant railroads which provided that they should give first mortgage bonds on their "rights, lands and franchises" and measured by the authorities hereinafter cited, there is nothing in the charters of the St. Paul and Pacific Company, the First Division Company or the Manitoba Company which would authorize the transfer of the tax exemption even if any of those companies had lawfully received the same.

It is true that by several supposedly confirmatory laws, the transfer of the tax exemption was sought to be recognized and validated. But these laws, as we shall see, were beyond the Constitutional competence of the Legislature to enact.

In 60 L. R. A. beginning on page 1, there is an exhaustive note covering the subject, "Corporate taxation in the United States as affected by the contract clause in the Federal Constitution." On page 99, after an exhaustive examination of the authorities, the annotator makes this statement:

> "A general rule deducible from all the authorities is that an exemption from, or a right

> to a limited taxation, belonging to a corporation, is a privilege altogether *personal* to the grantee, incapable of transference to another, save by a *specific enabling law,* couched in explicit language apt *to the purpose.*"

He cites an array of authorities which is conclusive as to the correctness of his position. We shall examine a few of them.

In Morgan v. La., 93 U. S. 217; 23 L. Ed. 861, there was involved an act incorporating a railroad company which provided that its capital stock should be exempted from taxation and that its shops, rolling stock and other appurtenances should be exempted for two years after the completion of the road within the limits of the state. Under a statute authorizing the execution by railroad companies of bonds secured by mortgages on their property and "franchises" a mortgage was given by the Company in question on the completed portion of its road including the land, equipments, appurtenances, rights and franchises applicable to such completed portion. The Company defaulted and the property was sold on foreclosure to Morgan.

The question was whether, under the designation of "franchises," the immunity from taxation accompanied the property in its transfer to Morgan or whether that immunity was a mere personal privilege and non-transferable. Held, that the immunity did not pass and that the property was exempt from taxation only so long as it remained the property of the Company.

Inter alia, the Court said:

> "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchise.' It is often used as synonymous with rights, privileges and immunities though of a personal and temporary character; so that if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the Company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the Company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road *as part of the property* of the company; *the latter is personal and incapable of transfer without express statutory direction.*"

In Wilson v. Gaines, 103 U. S. 417; 21 L. Ed. 401, it was held:

> "That mere general words of description are not sufficient to extend a sale beyond the subject matter of the lien as defined by the statute, which lies at the foundation of the entire proceeding."

The facts were these: In 1845 the N. & C. Ry. Co. was chartered to build a road from Nashville to Chattanooga. Its capital stock was exempted from taxation forever, and its road, etc., for twenty years from completion.

In 1852 the N. & S. R. R. Co. was incorporated to construct another line of road, and was to "have all the rights, powers and privileges" of the former Company.

In the same year the Edgefield & Ky. R. R. Co. was incorporated to build a road from Nashville to the Kentucky state line with the provision in its charter that it was to have all the powers, rights and privileges of the original N. & C. Co. In 1852 an act was passed authorizing the Governor to issue to certain railroad companies bonds of the state to aid in the completion of their respective roads wherein it was provided that, upon such issue and the completion of the roads, the State should be invested with a lien upon the roads, including stock, right-of-way , and all property owned by the companies incident to or necessary for the business. By an act of 1854 the privileges of the foregoing act were extended to the Edgefield & Ky. Co.

In 1855 the charter of the Edgefield & Ky. Co. was amended so as to give it all the rights and privileges conferred upon the N. & S. Co. by its charter. The Edgefield availed itself of the foregoing Acts and subjected its property to the statutory lien therein provided for.

An act was passed in 1870 providing for judicial foreclosure on the property of defaulting railroad companies under the bonds to the state. That act contained this provision:

> "That upon the sale of any of the franchises of either of the railroad companies by the Commissioners under the provision of this act, *all*

> *the rights, privileges and immunities* appertaining to the franchise so sold under its act of incorporation and the amendments thereto, and the *general improvement law* of the state and acts amendatory thereof, shall be transferred to and vest in such purchaser, and the purchaser shall hold said franchises subject to all liens and liabilities in favor of the state as now provided by law against the railroad companies."

As to the Edgefield Co. it was averred that, under a bill filed to foreclose the state's statutory lien upon the road, superstructure, equipments and stock, and the property owned by the company as incident to or necessary for its business, the road, its franchises, property, rights, privileges and immunities were sold, and the St. L. & S. Co. by sundry *mesne* conveyances had become invested with the title.

It was contended that the road remained exempt from taxation for twenty years after its completion. The State Supreme Court dismissed the bill, holding that the exemption from taxation originally granted to the N. & C. Co. was not one of the privileges which passed to the Edgefield Co., either by its original or amended charter. Without passing on that precise question, the United States Supreme Court held that it was not shown that, if the propery in the hands of the original company was exempt from taxation, that exemption passed to the purchasers at the sale to foreclose the State's statutory lien, under which the complainant claimed. The Court referred to Morgan v. La. *Supra*, as holding that immunity from taxation was a personal

privilege and not transferable except under the authority of the legislature, *and that such an exemption does not necessarily attach to or run with the property after it passes from the owner in whose favor the exemption was granted.*

The demurrer to the bill was sustained.

In Gulf, etc. Ry. Co. v. Hewes, 183 U. S. 66; 46 L. Ed. 86, it was held that the words "Rights and Privileges" were not sufficient to transfer any immunity from taxation.

In the case of C. & O. Y. Co. v. Miller, 114 U. S. 176; 29 L. Ed. 121, a mortgage was foreclosed by action under a statute providing that upon a conveyance to the purchaser under such a foreclosure, the old company should *ipso facto* be dissolved and the purchaser should forthwith become a corporation and that "the corporation created by or in consequence of such sale should succeed to all such franchises, rights and privileges * * * as would have been had by the first company but for such sale and conveyance."

The reasoning of the Court was to the effect, and it so held, that the immunity from taxation enjoyed by the old company did not pass to the new one because the latter was subject to the laws in force at the time of its creation (it was in the same situation as the Manitoba Co.), and among such laws were certain ones reserving the right to repeal or amend.

An immunity from taxation does not pass under the terms "property and franchises" in a deed of trust and foreclosure thereunder.

Lake Drummond v. Virginia, 49 S. E. 506.

In a New York case, City of Rochester v. Rochester Ry. Co., 182 N. Y. 99; 74 N. E. 953, it was held that, under a lease of street railway properties:

> "The exemption from the cost of paving the streets which may have been held by the Rochester City & Brighton R. R. Co. was personal and did not pass to the defendant."

The Court cited many cases from the U. S. Supreme Court and said:

> "The language of the statute before us is personal, not attached to the property. It enacts that 'the said Company' not 'Said Company,' 'its successors or assigns' shall not be required to bear any expense of repaving the streets."

Further, on the question whether the right of exemption was personal to the lessor company, the Court said:

> "This has been so held in a number of decisions by the Supreme Court of the United States. Shields v. Ohio, 95 U. S. 319, 24 L. Ed. 357; Railroad Co. v. Maine, 96 U. S. 499, 24 L. Ed. 836; Railroad Company v. Georgia, 98 U. S. 359, 25 L. Ed. 185; Norfolk & Western R. R. Co. v. Pendleton, 156 U. S. 667, 15 Sup. Ct. 413, 39 L. Ed. 574; Yazoo v. Adams, 180 U. S. 1, 21 Supt. Ct. 240, 45 L. Ed. 395; Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860; Wilson v. Gaines, 103 U. S. 317 (26 L. Ed. 401); Shesepeak & Ohio R. R. Co. v. Miller, 114 U. S. 176, 5 Supt. Ct. 813, 29 L. Ed. 121; Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805. In the Norfolk & Western Railroad case, it was said: 'We have frequently held that, in the absence of express statutory direction, or of any equivalent implication by necessary construction, provisions in restriction of the right of the state to tax the property or to reg-

> ulate the affairs of its corporations do not pass to new corporations succeeding by consolidation or by purchase under foreclosure to the property and ordinary franchise of the first grantee. * * * This we have stated to be a statutory rule of interpretation, founded upon an obvious public policy, which regards such exemptions as to derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris*. That privilege is not at all similar to such franchises as the right to construct and operate a railroad, to lay gas mains and supply gas, and to maintain a ferry. Those franchises, when granted, became property similar in their general attributes to other property. The grant of such a franchise, even without consideration, is unless a right to revoke is reserved, as effectual to vest an indefeasible title in the grantee as a voluntary conveyance of a piece of land. Not so, however, as to an exemption from taxation or from the exercise of the police power. It is property only granted on a consideration, and if granted without consideration, may be recalled. (See cases cited supra.) Doubtless such exemptions, if attached to property itself, would increase its value; but because they are against common right they will be construed to be personal, and limited to the grantee, unless a contrary intention clearly appears."

The case of Norfolk, etc. Co. v. Pendleton, 156 U. S. 667, cited in the foregoing opinion involved an immunity from interference by the State with the rate of tolls.

The Court held that the immunity provided in the charters of the original companies was personal to them *inasmuch as there was no clause or provision therein which could be interpreted as neces-*

sarily meaning that subsequent corporations, organized under later laws, could assert a valid succession to the immunities and privileges granted to them and hence that the same did not pass to the Norfolk & Western Company..

The last one was followed and approved in Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578 (41 L. Ed. 560).

In this case the right of the state to regulate tolls was also involved. The original company, by the same name as the plaintiff in error, was incorporated under an act of 1834. Its charter provided that the company should be entitled to fix its rates of toll until net dividends exceeded 14%.

By an act of 1839 amendatory of the act of 1834, it was provided that the stockholders of the company residing south of a certain point might elect a separate board of directors and have entire control of a part of the road located between certain towns; and that stockholders residing north of such point should have separate control of that portion of the road to the north but that the stock should continue joint and common to all the stockholders, after the completion of the road.

In 1851 an act was passed repealing the 1839 act in so far as the stock was to be held jointly and providing for a separation of the stock and an organization under the name of Covington & L. Turnpike Road Co. which should remain separate and independent of that portion of said company owning the stock to the south. The same provision was made as to the stockholders and formation of an in-

dependent company to the south. The act, among other things, contained these words:

> "Each company possessing and retaining all the powers, rights and capacities in severalty granted by the act of incorporation and the amendments thereto, to the original company."

In 1890 an act was passed reducing the rate of toll which reduced the net dividends below the point fixed in the charter of the original company. The plaintiff in error, being the company organized to the north as aforesaid, claimed that it was entitled to the immunities of the original company and hence that the act of 1890 impaired its contract. The Court of Appeals of the State of Kentucky overruled this contention. On appeal the Federal Supreme Court, in sustaining the state court on the point, used the following language:

> "These principles are in entire accord with the settled doctrines of this court. When a corporation succeeds to the rights, powers and capacities of another corporation, it does not thereby or necessarily become entitled to an exemption from taxation. An exemption or immunity from taxation so vitally effects the exercise of powers essential to the proper conduct of public affairs and to the support of government, that immunity or exemption from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question must be resolved in favor of the public. These are positive rights and privileges, this Court said in Morgan v. Louisiana, 93 U. S. 217, without which the road of a corporation could not be successfully worked but immunity from taxation is not one of them * * *

The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the state, and it should never be implied that the legislative department intended to surrender it. Such an intention should not be imputed to the legislature if it is possible to avoid doing so by any reasonable interpretation of its statutes. It is vital that the state should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. We admit there is some ground for the contention that, by the grant in the act of 1851 to each of the two corporations named in it, of 'the powers, rights and capacities' granted to the corporation of 1834, the legislature intended to exempt the new corporations, as it did the original ones, from all legislation that would prevent them from earning as much as 14 per cent on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporations such powers, rights and capacities as were necessary to the successful working of the respective roads, and not as exemption from legitimate ordinary legislative control of their affairs and business, it must, in the interests of the public, be so interpreted. It is settled law that in grants by the public nothing passes merely by implication; and if a contract with a state relating to the exercise of franchises is susceptible of two meanings 'the one restricting and the other extending the powers of a corporation, that construction is to be adopted which works the least harm to the state.' Chenango Bridge Co. v. Binghampton Bridge Co. 'The Binghampton Bridge' 70 U. S. 3 Wall.

51, 75 (18; 137, 43); Ruggles v. Illinois, 108 U. S. 526 (27, 812); Stein v. Beinville Water Supply Co., 141 U. S. 67."

In *Phoenix Co. v. State*, 161 U. S. 174; 40 L. Ed. 660, upon the question of a transfer of an exemption from taxes, this language was used:

> "If this were an original question, we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the *weight of authority, as well as the better opinion,* is in favor of the same conclusion which we should otherwise reach."

Upon Federal questions, the decisions of the Supreme Court of the United States should be controlling. If the decisions of that Court, above cited are to obtain, it must be conclued that the three per cent gross earnings tax privilege, as an irrepealable contract, was personal to the Minnesota & Pacific Company and incapable of transference to any successor. There was no apt language in the charter, the mortgages or the five million loan amendment which was specific enough or broad enough to authorize or operate as such a transfer.

But plaintiff-in-error will point to several laws of the State which are claimed to have the effect of authorizing the transfer of the tax immunity. Without discussing the meaning of such laws, we assert that in so far as they may have attempted to transfer, or authorize the transfer of, the three per cent gross earnings tax privilege as an irrepealable contract, they were unconstitutional. Sections 1 and 2, Article 9 of the Constitution, until

1871, prevented the State from conferring the privilege of a special form of taxation on any corporation.

To grant the right to transfer such a privilege would be for the State to confer it upon the transferee. Such an act would be as invalid therefore as the original grant.

This proposition is established by,

Yazoo Co. v. Adams, 180 U. S. 1, 45 L. Ed. 395.

The Yazoo Co. grew out of a consolidation, one of its predecessors having an exemption from taxation, its claim to which was in issue. Having in mind the decisions to the effect that a consolidation results in a new corporation, the articles of consolidation very adroitly provided that the transaction should not disturb the corporate existence of the old company having the exemption. Notwithstanding this, the court held that a new corporation had been formed and that it was subject to the constitution then in force, the effect of which was to cut off the exemption from taxation.

Inter alia, the Court said:

> "But it is scarcely necessary to say that, if the consolidation of 1892 resulted in a new corporation, it would come into existence under the Constitution of 1890, with the disabilities attached thereto, among which is the provision that 'the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals.' Even if the legislature, in these several acts of consolidation, had expressly provided that the new corporation thereby formed should be exempted from tax-

> ation, the higher law of the Constitution would be interpreted as nullifying it to that extent."

In *Trask v. Maguire,* 85 U. S. 391, 21 L. Ed. 938, it was held that a similar inhibition in a State Constitution applied in *"all its force against the renewal of an exemption equally as against its original creation"* and that the Legislature could not disregard such a prohibition in providing for the sale of the property which, as in this case, it had purchased.

In this connection attention is called to the following excerpt:

> "What was said in the opinion in State v. Winona & St. P. Ry. Co., 21 Minn. 315, in reference to the case of Trask v. Maguire, supra, should be given no greater force or effect than the decision of a question now claimed to have been determined, but which was not before the Court."
>
> Trans. p. 358.

Of course this Court is not bound in the instant case by the refusal of the Minnesota court to give proper effect to the rule as laid down in Trask v. Maguire, supra.

See also:

> Louisville & Nashville Ry. Co. v. Palmes, 109 U. S. 244; 27 L. Ed. 922.
>
> Keokuk & Western Ry. Co. v. Missouri, 152 U. S. 301; 38 L. Ed. 450.

These and other cases in point will be quoted from and discussed under our next point.

We are not unmindful of the fact that the fore-

going argument runs counter in some degree to obiter statements in former opinions of the Minnesota Court. Those decisions will be examined under Points VI and VIII hereof.

IV.

THE THREE PER CENT GROSS EARNINGS TAX PRIVILEGE, AS AN IRREPEALABLE CONTRACT, COULD NOT PASS TO THE MANITOBA COMPANY, WHICH WAS LEGALLY INCAPABLE OF RECEIVING IT.

The foregoing proposition, if tenable, disposes of plaintiff-in-error's claim that the three per cent tax privilege vested in the Manitoba Company as an appurtenance of the road.

The Manitoba Company was organized under the general laws of this State in 1879. *It could get only the franchises and privileges which its creator was then competent and willing to give to it. The State could not give it an irrepealable contract right to a special form of taxation. Certainly no private corporation could confer what the State, by its Constitution, was prohibited from giving.*

After the constitution was adopted, the Legislature was incompetent to make an original grant of an immunity from taxation or to except railroads from the *ad valorem* system made mandatory by the Constitution.

It must follow that the right to a special system of taxation, could not be given to a new corporation, nor to an old one under the guise of a renewal of its privileges or the extension to it of the privileges of another. The renewal or extension of such an immunity is as much a sovereign grant as is the original act conferring it on the first taker.

Franchises and similar privileges or immunities can never be conveyed by the unaided act of the corporation owning them. They can be received only from the sovereign and when they are transferred, nominally from one corporation to another, which can be done only by sovereign permission, they are really, and as a matter of legal fact, surrendered to the sovereign by the grantor and by it regranted to the grantee corporation.

To argue otherwise is to say that one corporation, by transferring all its franchises and privileges, could create another. This is of course impossible and its impossibility demonstrates the accuracy of the opposite argument.

The idea has been expressed, with respect to consolidation, in this language:

> "Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature and the formation of a new company out of such portions of the old as enter into the new."
>
> Lauman v. Lebanon v. R. Co., 30 Pa. 42; 72 Am Dec. 685.

For a discussion and approval of this statement, see 60 L. R. A. 53, et seq. The principle has re-

ceived repeated approval in the decisions hereinafter cited.

It is therefore obvious that the State could not have created in 1879, a new corporation with an irrepealable and unchangeable gross earnings tax privilege. It could not confer such a privilege on either a new or an old corporation by way of original grant or by consenting to a transfer from an old to a new corporation.

The leading case on this subject is *Trask v. Maguire,* 85 U. S. 391 (21 L. Ed. 938.)

The head notes correctly and fully summarize the decision and are as follows:

> 1. "Where the property of a railroad company is, by an irrepealable legislative grant, forever exempted from all state and county taxes, and the State made a loan of its bonds to the road, and acquired a mortgage upon it, and on a failure to pay the interest, the property was sold to the State on Foreclosure of the mortgage: Held, that when the State became the purchaser, the immunity ceased.
>
> 2. Subsequently the road and its franchises were sold by the State to individuals who became incorporated under a state act which conferred on the new Company all the *immunities* which the old company had, under its charter: Held, that the new company thus acquired all the immunity from taxation which the original company had possessed if it were competent for the Legislature at the time, under the new State Constitution, to confer this privilege.
>
> 3. The new State Constitution, in force at the time of the last sale, provided that no property should be exempt from taxation, except public, school property; held, *that the inhibition of the State Constitution applies in all its force against the renewal of an exemption*

> *equally as against its original creation;* and this inhibition the Legislature could not disregard, in providing for the sale of its property which it had purchased."

The decision of the Court was reached notwithstanding the fact that the State Legislature had provided by its Act of February 19, 1866, that the persons purchasing the roads should have "all the rights, privileges, franchises and *immunities*" of the old company, for whose default, the properties had been sold at foreclosure under the charter and laws applicable, and notwithstanding a further Act of the Legislature, approved March 17, 1868, by which the legislature attempted to confirm in the purchasing company "all the rights, privileges, franchises and *immunities of whatever kind* theretofore belonging to said defunct corporation."

The Court said, *inter alia*:

> "The act under which the sale was made provided that the purchasers of the road should have all the rights, franchises, privileges and *immunities* which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limitations and conditions therein contained, and not inconsistent with the Act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company originally possessed, *if it were competent for the Legislature at the time, under the new Constitution, to confer this privilege.* The question, therefore, is whether the legislature was competent to grant the immunity claimed under that Constitution, which went into operation on the 4th of July, 1865, previous to the passage of any of the Acts authorizing the proceedings under which the new company acquired its rights."

The new constitution referred to prohibited, with certain specifications, all exemptions from taxation, in that respect being substantially to the same effect as Article 9 of the Constitution of this state. Mr. Justice Field wrote the opinion and these are his closing words:

> "The inhibition of the Constitution applies in all its force against the renewal of an exemption equally as against its original creation and this inhibition the Legislature could not disregard in providing for the sale of the property which it had purchased."

The case of *Louisville & Nashville Ry. Co. v. Palmes*, (109 U. S. 244; 27 L. Ed. 922) also involved this question. The transaction under review was a foreclosure on railway properties, under a statute which declared that the purchasing company should be "deemed in law and equity to be fully invested with and entitled to all the said property, rights, franchises, privileges and *immunities* of the old company."

The Court followed Morgan v. Louisiana, and Wilson v. Gaines, *supra*, in holding that the exemption from taxation belonging to the defunct company was personal to it, and was not transferred by the mortgage and foreclosure. It then said that the alleged transfer and continuance of the exemption failed "for a distinct and deeper reason" which was that the attempted continuance of the exemption in the purchasing company was in violation of the Constitution of Florida which took effect in

1868 and which required uniformity and equality of taxation.

With respect to its position on this point, the Court said:

> "It does not weaken this conclusion to say that the exemption contained in the Internal Improvement Act of 1855 was authorized by the Constitution of the State then in force, which may be admitted, and that it was assignable in its nature or by its terms, in such manner that it became impressed upon the property itself into whosesoever hands it should afterwards come, following the title, like an easement or a covenant running with the land, which we have shown, however, not to be the case; for even on that supposition, the privilege is one that must be exercised by some person capable in law of accepting and exercising it. The conception of an immunity that is impressed upon the things in respect to which it is granted is purely metaphorical. The grant is to a person in respect of a thing, and it is said to inhere in or be attached to the thing, and passes as an incident with the title to each successor. There must always be a person capable not only of receiving the title, but also of accepting the conditions accompanying it, and which constitutes the exemption; otherwise the conditions become impossible and void.
>
> After the adoption of the Constitution of Florida of 1868, there could be no corporation created capable in law of accepting and enjoying such an exemption, for that was prohibited by the constitutional provisions that have been cited. In the case of the Pensacola and Louisville Railroad Company in 1872, the capacity at that time to receive this privilege depended altogether on the Legislative Act amending its charter to that effect; and if any doubt as to this might be reasonably entertained, certainly none can arise as to the Pensacola Railroad

> Company, which derived all its powers and its very existence from legislation dependent for its validity wholly upon the Constitution of 1868. *The prohibition which forbids the Legislature* from exempting the property of railroad corporations from taxation, makes it impossible for the Legislature to create such a corporation capable in law of acquiring and holding property free from liability to taxation."

In 1879, therefore, the State of Minnesota, could not create a corporation which could possess an irrepealable or unchangeable immunity from taxation. It follows that the Manitoba Company was incapable of taking such an exemption even though it might have been appurtenant to property purchased by it.

The situation is the same as if A, B, and C owned adjoining lands and, appurtenant to his land, A had an easement upon the land of C which B, by law or contract, was forever prohibited from enjoying. A might sell his land to B, but the appurtenant easement would fail for want of a taker, B being legally prevented from possessing it. So, assuming that its grantors had an irrepealable contract right in the three per cent tax, appurtenant to their properties, yet it could not pass at the foreclosure sale to the Manitoba Company because that Company was legally incapable of enjoying such a right.

In Keokuk & Western Ry. Co. v. Missouri, 152 U. S. 301, 38 L. Ed. 350, there was under consideration the claim of the plaintiff in error that it was entitled to the exemption from taxation con-

tained in the original charter of the Alexandria & Bloomfield Railroad Company of which it was the successor in interest. The original exemption had been granted 1857. In 1865 the State adopted a new constitution prohibiting exemptions from taxation. By an Act approved March 2, 1869, it was claimed that the plaintiff in error had become entitled to all the "franchises and privileges" of the old company. Whether this language was sufficient to pass the immunity from taxation was said to be a question of doubt, but the Court disposed of the claim of the plaintiff in error in this language:

> "*But the decisive answer to this objection is that the Legislature had no power, in* 1869, *to extend to a new corporation created by the consolidation, an exemption contained in an act passed in* 1857, *before the constitution was adopted,* and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

The third and fourth head notes of *Gulf, etc., Railroad Company v. Hewes,* 183 U. S. 66 (46 L. Ed. 86), are as follows:

> "3. The charter of the Gulf & Ship Island

Railroad Company, granted by Miss. Act, February 23, 1882, even if it be considered as a revival of the rights and privileges which had formerly belonged to a company chartered in 1850, is taken subject to the provision of Miss. Const. 1869, which required the property of such corporation be taxed, like that of individuals, in proportion to its value.

4. A subrogation by statute of one corporation to the rights and privileges of a former corporation does not include an immunity from taxation."

Following these cases, a state statute attempting to fix in a contractual way the rate of taxation on the gross receipts of a railroad was held subject to the constitutional provisions in force at the time of its enactment.

Northern Central Railway Co. v. Maryland, 187 U. S. 258 (47 L. Ed. 167).

After an amendment of a state constitution prohibiting exemptions from taxation, no new corporation is capable of receiving and enjoying old exemptions of this character.

Bloxham v. Florida, etc., Railroad Co., 35 Florida, 625.

Another case exactly in point is,

Mercantile Bank v. Tenn., 161 U. S. 161, 40 L. Ed. 656.

In this case it was held that a judicial sale of the charter of a bank did not carry an exemption from taxation, the sale being made after the State Constitution had prohibited exemptions from taxation, although the purchasers of the charter were recognized by the Legislature as a corporation.

Mr. Justice Peckham applied the law to the facts before him in this language (161 U. S. 171, 40 L. Ed. 659):

> "All that Mr. Taylor and his associates could have acquired by the purchase of the charter, after the adoption of the Constitution of 1870, if they acquired anything were the rights and privileges mentioned in the charter, and subject to the provisions of the constitution and laws existing at the time of such purchase."

The Mercantile Bank case was one of the several Tennessee cases, all of which have an important bearing, in our opinion amounting to control, on this case. They were all decided by the United States Supreme Court on March 2, 1896, and are reported in 161 U. S., beginning on page 134. (40 L. Ed. 645.)

In the case of *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, Mr. Justice Gray, writing for an unanimous Court, used the following language:

> "If the * * * Railroad Company as reorganized by the purchasers at the sale under the decree of foreclosure of the previous mortgages, was a lawful corporation of the State of Arkansas, it was not the same corporation as that chartered by the Legislature in 1853, but was a new *corporation, subject to the provisions of the Constitution and Laws in force when it first came into existence, that is to say, in* 1877."

In *Wellman v. Chicago G. & T. Ry. Co.* (Mich.) 47 N. W. 489, it was held that the Railway Company could not explain that a certain act of the

Michigan Legislature violated the contract made between it and the State when it became incorporated under the General Railway Laws since it was so incorporated after the adoption of the Constitutional Amendment, which was a part of the General Laws at that time.

The case of *Memphis & L. R. R. Co. v. Commissioners,* 112 U. S. 609 (28 L. Ed. 837), is so conclusive on this point—as well as on others—that we quote it here at length. Mr. Justice Matthews, writing for an unanimous Court, said, *inter alia*:

> "It is a mistake, however, to suppose that the mortgage and sale of a charter by a corporation, in any proper sense which can be legally imputed to the words, necessarily conveys every power and authority conferred by it, so far, at least, as to vest a title in them, as franchises, irrevocable by reason of the obligation of a contract. In many, if not in most, Acts of Incorporation, however special in their nature, there are various provisions which are matters of *general law,* and not of contract, and are, therefore, subject to modification or repeal.
>
> Such, in our opinion, would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration it had been conferred in express terms, and particular provision has been made as to the mode of procedure to effect the purpose. It would be a matter of law and not of contract. At least, it would be construed as conferring only a right to organize as a corporation, according to such laws as might be in force at the time when the actual organization should take place, and subject to such limitations as they might impose. It cannot,

we think, be admitted that a statutory provision for becoming a corporation in future can become a contract, in the sense of that clause of the Constitution of the United States which prohibits state legislation impairing its obligation, until it has become vested as a right by the actual organization under it; and then it takes effect as of that date and subject to such laws as may then be in force. Such a contract, so far as it seems to assume that form, is a provision merely that, at the time or on the happening of the event specified, the parties designated may become a corporation according to the laws that may then be actually in force. The stipulation, whatever be its form, must be construed as subject and subordinate to the paramount policy of the State, and to the sovereign prerogative of deciding, in the meantime what shall constitute the essential characteristics of corporate existence. *The State does not part with the franchise until it passes to the organized corporation; and when it is thus imparted, it must be what the government is then authorized to grant and does actually confer.* * * *

It is, of course, the law in force at the time the transaction is consummated and made effectual, and must be looked to as determining its validity and effect. This is the principle on which this Court proceeded in deciding the case of R. R. Co. v. Ga., 98 U. S. 359. The franchise to be a corporation remained in and was exercised by the old corporation, notwithstanding the mortgage of its charter, until the new corporation was formed and organized; it was then surrendered to the State, and by a new grant then made passed to the corporators of the new corporation, and was held and exercised by them under the constitutional restrictions then existing.

Our conclusions, then, are: that the exemption from taxation contained in the 28th Section of the Act of January 11th, 1853, was in-

> tended to apply only to the Memphis and Little Rock Railroad Company as the original corporation organized under it; that it did not pass by the mortgage of its charter and works, as included in the transfer of the franchise to be a corporation, to the mortgagees or purchasers, at the judicial sale; that the franchises embraced in that conveyance were limited to those which had been granted as appropriate to the construction, maintenance, operation and use of the railroad as a public highway, and the right to make profit therefrom; and that the appellant not having become a corporate body until after the restrictions in the Constitution of 1874 took effect, was thereby incapable in law of having or enjoying the privilege of holding its property exempt from taxation."

This case was cited by Mr. Justice Peckham in *Mercantile Bank v. Tennessee, supra,* as authority for the following proposition:

> "Such a sale (of a corporate charter and franchises) it has been held, does not transfer to the purchaser the right to be a corporation, but only the right to reorganize as a corporation, *subject to the laws, constitutional and otherwise, existing at the time of the reorganization.*"

A law of West Virginia relating to sales under trust deeds and mortgages, and to judicial sales of railway properties, provided that purchasers thereat should "succeed to all such franchises, rights and privileges * * * as would have been had * * * by the first company but for such sale." The United States Supreme Court held that the new company did not take an immunity or exemption from taxation which belonged to the old company, and that the new company took

all grants of corporate powers, rights, privileges and immunities subject to the laws existing at the time of its creation.

Chesapeake & O. Ry. Co. v. Miller, 114 U. S. 176, 29 L. Ed. 121.

See also,

Yazoo Co. v. Adams, 180 U. S. 1, 45 L. Ed. 395,

wherein it was held that a railroad corporation was incapacitated from taking an immunity from taxation held by a predecessor because of the provisions of the Constitution in force when it was organized.

In *Rochester Railway Company v. Rochester*, 205 U. S. 236,

it was held that where a corporation was incorporated under a general act creating certain obligations, it could not receive by transfer from another company an exemption inconsistent with the Constitution and laws then applicable, and this, even though the legislative authority undertook to transfer the exemption by words which clearly included it. The previous decisions of the Court are collated on page 254. Concerning them, the Court, speaking by Mr. Justice Moody, said:

> "The principle governing these decisions, so plain that it needs no reasoning to support it, is that those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the law then in force, whether written in the Constitution, in general laws, or in the charter itself."

The latest utterance of the Supreme Court of the United States upon the question is found in its decision of

Yazoo and Mississippi Valley Railroad Company v. The Mayor and Aldermen of the City of Vicksburg, 209 U. S. 358,

decided April 6th, 1908. Again the question before the Court was as to whether or not an exemption from taxation enured to the benefit of a consolidated corporation, and successor to the original holder of the exemption. The new corporation came into effect after the adoption of the Mississipi Constitution of 1890, which prohibited the exemption of corporate property from taxation. With respect to this situation the Court said:

> "We think that it is entirely clear that the effect of organizing the consolidated corporation after the adoption of the Mississippi Constitution of 1890 was to bring the new corporation within the terms and limitations of that constitution, which prohibited exemption of corporate property from taxation. The exemption to the former constituent company could not inure to the consolidated company without, in effect, ignoring the constitutional provision."

Reference is then made to the Rochester case last above cited. The Court closes its opinion with the following words:

> "The formation of the consolidated company was not imposed upon the complainant; it had the privilege of standing upon such rights as it had by contract or otherwise under the former legislation in force before the adoption of the new constitution. When it saw fit to enter into

the consolidation and form a new corporation in 1892 the constitution then in force in the State became the law of its corporate being, and the requirement that corporate property should not be exempt from taxation then became binding upon it, as upon all other corporations formed under the new organic law."

The Supreme Court of Minnesota disposes of this proposition in the case at bar as follows:

"But there is still another and stronger reason why an irrevocable contract right did not pass to the companies succeeding to the rights of the Minnesota Company. The contract, whatever may be its interpretation as between the territory and the original company, was entered into in 1857. Thereafter, in May, 1858, the territory was admitted to the Union as a state. The foreclosure of the Minnesota & Pacific mortgage, from and through which the alleged immunity came, if at all, to defendant, occurred after the state was so admitted. Without stopping to consider the question whether there was a complete merger of the territorial exemption when the state became the purchaser and owner of the property, rights, and privileges of the company at the foreclosure sale, in so far as that exemption related to the earnings tax, treating it, as we must, independently of the land grant exemption, the further question whether the state could then grant a special privilege of this kind is answered in the negative by the positive terms of the constitution on the subject of taxation. The constitution then expressly provided (section 1, art. 9), that 'all taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state.' The following section specifically limited the right of exemption, and did not include exemptions of

the character here involved, nor authorize an earnings tax in lieu of all other taxes. This clearly precluded the state legislature from providing this form of taxation by the revival of an old grant or otherwise, or from extending to any person or corporation an exemption from general taxation in consideration of the payment of an earnings tax. Nor could it create a corporation with the right to receive or hold a special privilege of this sort. This would seem too clear under the authorities to admit of serious argument."

(Trans. p. 354.)

"It follows, therefore, that an irrevocable right to the gross earnings system of taxation at an unchangeable rate did not pass from the state when it conferred upon the immediate successors of the original company all the property, rights, privileges, franchises and immunities of that company which it acquired on the foreclosure. Nor was one created by the acts of the state legislature in 1865 by which the original charter provisions on the subject were modified. Chapters 6 and 9, pp. 40, 47, Sp. Laws 1865. The legislature of the state was prohibited by the express mandate of the constitution from granting such an immunity. All statutes, therefore, by which an attempt was made to confer the immunity upon defendant's predecessors in interest were unconstitutional and void. State v. Stearns, 72 Minn. 200, 75 N. W. 210."

(Trans. p. 355.)

V.

IF THERE EVER WAS A CONTRACT RIGHT TO THE THREE PER CENT GROSS EARNINGS TAX AND THE ACCOMPANYING EXEMPTION, IT WAS LOST BY THE EXTENSION OF THE ROAD INTO OTHER STATES, AND BY THE CONSOLIDATION WITH THE EASTERN MINNESOTA LINES IN THE GREAT NORTHERN SYSTEM IN 1902.

Under this heading attention is called to the lease for a period of nine hundred and ninety-nine years of the Manitoba lines to the plaintiff in error, bearing date February 1, 1890, and the lease for a period of ninety-nine years of the lines of the Eastern Railway Company of Minnesota to the plaintiff in error, bearing date May 1, 1902. (Trans. p. 44, 28.)

It is submitted that the practical effect of these transactions is to bring about a practical consolidation of the properties. It is believed that the transactions in question, including the extension into other states, resulting in a transcontinental system of railway company, and the consequent conditions and methods of accounting, are not within the original purview of Section 18, of the Charter, on which plaintiff in error relies.

It is believed this condition, like unto a consolidation, brings the case within the rule of *Maine Central R. R. Co. v. Maine*, 96 U. S. 499, as follows:

> "1. Where, in the charters of two railroad companies there was a clear condition of limitation upon the power of the state to tax them, and by voluntary consolidation of the two companies into one, they disabled themselves from a compliance with the conditions, upon the performance of which the limited amount to be paid as a tax to the state could be ascertained, they must be construed as having waived the exemption depended upon such performance."

The rolling stock and equipment of the Manitoba Company has disappeared, has been turned over to the plaintiff in error, and in effect has been sold to it. The other assets of the Manitoba Company have been intermingled with those of the Eastern Minnesota and other constituent companies of the Great Northern system.

While as a matter of accounting there has been a prorating of earnings on interstate business based upon relative mileage in the state to the total mileage carried, this only approximates the Minnesota earnings, for rates of carriage both passenger and freight are not identical on a mileage basis on interstate business. In short the plaintiff in error has not reported the gross earnings of the chartered railroad and cannot do so. It is a question of strict construction, and certainly the situation is not within the purview of Section 18, supra.

VI.

THE SUPREME COURT OF MINNESOTA HAS NEVER ADJUDGED THAT A TERRITORIAL CHARTER EXEMPTION FROM TAXATION WAS APPURTENANT TO THE RAILROAD SO AS TO PASS THEREWITH INTO THE OWNERSHIP OF A COMPANY WHICH DID NOT UNDERTAKE TO AND DID NOT CONSTRUCT OR COMPLETE THE ROAD COVERED BY THE CHARTER, AND TO SECURE THE CONSTRUCTION OF WHICH THE SAME WAS GRANTED. IN SO FAR AS THE EXEMPTION HAS BEEN HELD AN APPURTENANCE IT HAS NEVER BEEN ADJUDGED TO BE SUCH AS AN IRREPEALABLE CONTRACT RIGHT.

It is to be observed at the outset, that notwithstanding the contentions of the plaintiff in error that the decisions of the Supreme Court of Minnesota have held that the exemptions of taxation in question are irrevocable contracts which are appurtenant to the railroad and pass to any company that may acquire the ownership thereof, this court, when construing a statute on the question whether it is a contract, and in determining whether, if there be a contract, its obligation has been impaired by subsequent state legislation, is not bound by previous state decisions, and will decide the matter independently thereof.

County of Shelby v. Union & Planters' Bank, 161 U. S. 149.

Citizens' Bank v. Owensboro, 173 U. S. 636.

(a) THE DUAL NATURE OF THE GROSS EARNINGS SYSTEM OF TAXING RAILROADS.

It is to be remembered that the gross earnings system of taxation of railroads has ever been deemed a convenient one and likely to produce the best results. In short, it is the payment of a direct tax to the state measured upon the gross earnings of the company, in lieu of all other taxes. It is still a tax upon the property, franchise, stock, capital, rolling stock and all property of the company used for railroad purposes. It is a property tax commuted upon the earnings, and the payment of the percentum tax pays the tax resulting otherwise upon general lists. The Supreme Court of Minnesota has recognized this status throughout all its decisions, and reference thereto is superfluous.

Besides the commuted system thus referred to, peculiar to railroad properties, as such, there runs through all the gross earnings taxing provisions the separate subject matter of the taxation of the lands granted in aid of railroads. In passing it is well to have in mind the general history of the land grants in aid of railroads; that, peculiarly, the lands thus granted, to be of aid to said railroads, should not be taxed but should be exempt until sold or contracted to be sold.

Two features thus appear; the commuted railroad property tax and the specific exemption of the lands. The consideration of the exemption of the lands may be considered to be both the acceptance of the grant by the company, and the performance of the conditions of the grant, and the annual pay-

ment of the gross earnings tax. The subject matter of the lands is clearly an exemption from taxation and the commuted tax, as far as it is claimed to be an irrepealable contract, is likewise in the nature of an exemption from other or farther taxation, which brings the case within the rules of construction applicable to exemptions from taxes when they are claimed to exist as contract rights which cannot be impaired.

The dual proposition is thus distinguished by the Minnesota Court:

> "Two distinct provisions on the subject of taxation were embodied therein (the Charter) the first providing for a gross earnings tax in lieu of all other taxes and assessments, and, second, an exemption of the land granted until sold or contracted to be sold by the company." (Trans. p. 350.)

and again:

> "A distinction must not be overlooked, when considering the assignability of a tax exemption, between those imposing a commuted system in lieu of property taxes and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land is granted to a railroad company to aid in the construction of a railroad, and is specifically exempted from taxation until sold by the company, and the company accepts in consideration of the exemption, the exemption attaches to and follows the land. State of New Jersey v. Wilson, 7 Cranch, 164, 3 L. Ed. 303; State v. Hicks, 9 Yerg. (Tenn.) 486, 30 Am. Dec. 423; International v. State, 75 Tex. 356, 12 S. W. 685. In such case, as we have

frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it." (Trans. p. 353.)

(b) THE STEVENS AND TRAVERSE COUNTY CASES.

An examination of two of the Minnesota decisions is a review of all the cases, so far as here material, because in them the former adjudications are reviewed.

The two cases referred to are:

Stevens County Case, 36 Minn. 467 (1887).

Traverse County Case, 73 Minn. 417 (1898).

The *Stevens County Case* was certified to the Supreme Court on a judgment of the District Court in proceedings to enforce the payment of taxes on lands which the Manitoba Company had contracted to sell, but which had not yet been conveyed to the purchasers, they not having performed under the contracts. The case was before the Court *upon the answer of the company*, the allegations of which had been stipulated to be true. Among these allegations was one to the effect that "all the property, rights, franchises, immunities, exemptions and privileges at any time possessed," by the Minnesota and Pacific, the St. Paul and Pacific and the First Division Companies, or either of them "including the exemption from ordinary taxation * * * pertaining to said line of railroad and said granted lands," had passed to the Manitoba Company by the foreclosure sales,

and had been "fully confirmed" in said company by the Act of the Legislature approved March 7, 1881, entitled "An Act Confirming the organization and certain purchases of the St. Paul, Minneapolis and Manitoba Railway Company." Idem. pp. 467-8-9.

The decision of the Court was expressly based upon this stipulation as against the attempt to claim that the exemption in favor of the First Division Company never passed by mortgages and their foreclosures to the Manitoba Company. The Court said, thereby avoiding a decision on the question, that:

> "By the admitted facts to which we have referred, the contrary is established *for the purposes of this case* and we forbear considering this question, upon which, as was intimated by the Attorney General when the cause was presented, he should have desired to be heard on the part of the state if the question had been open for consideration."

This language is found in 36 Minn., page 473. and the Court continued:

> "And for the same reason, the constitutionality of the act of 1881, confirming in this respondent its asserted rights, will not be considered. It is unimportant, except as it might bear upon the fact as to the acquirement by the respondent of the title to these lands with the pre-existing right of exemption, *which facts are admitted.*"

It is thus made clear that the Court carefully and expressly avoided deciding either that the three per cent gross earnings tax privilege passed to the Manitoba Company as an irrepealable contract, or

that it was within the power of the State to countenance any conveyance which sought to vest such a privilege in that Company, or to confirm the same.

Neither did the Court hold that the exemption from ordinary taxation was appurtenant to the railroads, and, having reviewed all the cases, it was not of the opinion that such was the effect of the former decisions. What it did hold, after such review of the former cases, and what it did state as their effect was this (page 470):

> "That the exemption from ordinary taxation, created in 1857, in favor of the Minnesota and Pacific Railroad Company, subsequently passed *with the lands, and as a right appendant thereto* to the St. Paul and Pacific Railroad Company, and to the First Division of the St. Paul and Pacific Railroad Company."

This language necessarily excludes the idea that the exemption from ordinary taxation was apputenant to the railroad. It goes to the extent only of saying that the exemption was appurtenant to the land grant.

It will be noted from the citations on page 470 that all of the former decisions were considered by the Court, and that this case stands as a re-statement and review of the conclusions therein reached. Yet there is no statement to the effect either that there was an irrepealable contract right in the three per cent gross earnings tax, or that the same was appurtenant to any line of road.

We come now to the *Traverse County* case, and find its language and the scope of the decision restricted in the same careful manner.

Proceedings were instituted in the District Court to enforce the payment of taxes upon lands included within the Congressional grants. The property taxes had already been paid under the three per cent commutation. The Manitoba Company filed objections and upon judgment in its favor, again on a stipulation of facts, the case was certified to the Supreme Court upon twelve questions which were reduced to one by Mr. Justice Mitchell, which he thus stated:

> "Are these lands, upon the facts, subject to taxation in the ordinary way?"

After stating briefly the history of the gross earnings tax litigation down to that time, he further stated that the Manitoba Company became "the owner of all the railroads, property, granted lands and all rights, franchises, privileges, immunities and exemptions at any time possessed by the mortgagor companies, or either of them, in so far as such rights, privileges, immunities and exemptions could be legally mortgaged, assigned or conveyed by said companies, or either of them, or acquired by purchase at such mortgage foreclosures or otherwise."

He then proceeds as follows (73 Minn. 423):

> "Counsel for the state concedes that, under the doctrine of the Parcher case, these lands, at least so far as included in the original congressional grant of 1857, were exempt from this form of taxation in the hands of the First Division Company. That case was decided 29 years ago, and has been repeatedly followed or recognized by this Court as the law. It has

become a law of property, and must be adhered to.

But the chief contention of the state is that this immunity of its road, lands, etc., from the ordinary taxation was not a franchise or attached to the property, but a mere personal privilege to the First Division Company, which could not be transferred, by mortgage or otherwise, to any other company. And counsel has cited numerous authorities from other jurisdictions, and particularly from the Supreme Court of the United States, as supporting his contention."

The correctness of the position thus taken by Attorney General Childs is tacitly acknowledged by the Court, for they leave it without comment, and thus state their reasons for holding against it:

"But we have in this state a body of law commencing over 40 years ago, made up of the acts of the legislature, the practical construction of these acts by the executive department of the government, and the judicial construction of them by our Courts, which must control the decisions of this question as applied to these old territorial 'land grant' railroad companies, without reference to the general doctrine or the decisions in other jurisdictions on the subject.

It is part of the legislative history of Minnesota, both as a territory and a state, that its policy in regard to taxing land-grant roads was adopted with reference alike to facilitating the early construction of these lines of road and to securing to the state what was supposed an ultimate and adequate return for the value of the franchises conferred, and which would, in the long run, be the equivalent of the companies' fair share of taxation. The policy adopted was to provide for these companies paying to the state a certain percentage of their gross earnings in lieu of all other taxa-

> tion on their railroads, and also on their granted lands until sold by the company; this latter being (unfortunately, as subsequent experience has proven) without limitation as to time. The object of this was not to grant a personal favor to the original companies, but *to secure the construction of the lines of road.* Hence, as might be naturally supposed, the history of legislation, as well as the decisions of this Court, clearly indicate that the general understanding was that this system of taxation was not personal to the original company, but was to be alike applicable *to any of their successors which might assume the completion of the road.*"

This language makes it clear that Mr. Justice Mitchell, and the other learned Justices who concurred with him, were not of the opinion that it had been held previously, or that it should then be determined that the exemption from ordinary taxation would pass to any company, but only to one which might receive the franchises and land grant of the former companies and thereupon and in consideration thereof "assume the completion of the road."

It did not appear in that case that the Manitoba Company did not earn any of the land grant of the Minnesota and Pacific, or construct and complete any of the lines authorized by its charter. On the contrary, it must have been assumed erroneously, and the assumption was undoubtedly based upon the stipulation, that the Manitoba Company did construct and complete some of the road in question so as to earn or at least complete the earning of the land grant. This was undoubtedly the case,

as the Manitoba Company did earn a land grant, as we understand it, but it did not earn any of the original Minnesota and Pacific land grant, because it did not complete any of the lines of that Company.

Again does the Court (73 Minn. 424) undertake to review its former decisions and restate their result, and it does so in this language:

> "The decisions of this Court from the Parcher case down have all been to the effect that this exemption from ordinary taxation was not simply a personal privilege conferred upon the original company, *but was appurtenant to the line of road, and existed in favor of any company which, in consideration of the land grant, should assume the construction and maintenance of the line by which it was applicable;* that the immunity as well as the burden passed to any company which acquired the road, and assumed its operation and the performance of *all the other duties which the original companies owed to the public.*"

We now come to the language (page 426) which shows that the Court considered it immaterial whether the Manitoba Company could depend upon the Territorial Charter, and which makes it evident that the decision was not based upon that ground, for it said:

> "But it is immaterial whether these acts were or were not valid when originally enacted, for the reason that they were validated by the constitutional amendment of 1871 (State v. Luther, 56 Minn. 156, 57 N. W. 464); and it could not be claimed in any event that they were repealed or modified prior to the passage of the Anderson bill in 1895."

And after stating that the State could not collect for any one year taxes under both the gross earnings and the ordinary system, and in order to make clear the limited effect of the decision then being announced, it is said:

> *"The question whether the legislation on the subject involves the elements of a contract between the defendant or its predecessor and the State is not necessarily involved, and need not be considered."*

And the conclusion of the Court, and the only thing by it adjudged, was thus stated:

> "Our conclusion is that the Court below correctly decided that these lands were not subject to ordinary taxation in 1894, and that its judgment should be affirmed. It is so ordered."

The Traverse County case is the most favorable expression of the law for the defendant that can be found. Yet it is expressly stated there, as it was in the Luther case, on rehearing (56 Minn. 165), that *the question of whether the gross earnings laws were contracts was not before the Court and was not decided.*

After a careful review of the decisions, Mr. Justice Mitchell states (73 Minn. 424) that it had been held that "this system of taxation was not personal to the original company, but was to be alike applicable," *not to all or any of its successors, but only "to any of their (its) successors which might assume the completion of the road."*

In the next paragraph there is a repetition of the same idea in the same carefully selected and re-

strictive language. He said, not that the exemption was appurtenant to the line of road, and existed in favor of any company which might own or lease the road, but that it, "was appurtenant to the line of road, and existed in favor of *any company which, in consideration of the land grant, should assume the construction and maintenance of the line by (to) which it was applicable.*"

In support of our contention that the Supreme Court of this State has never held that any of the gross earnings laws constitute an irrepealable contract, we call the Court's attention to the fact that all the decisions were carefully examined by the Supreme Court of the United States when the Stearns case was before it (179 U. S. 223, 45 L. Ed. 162.)

Referring to the concurring opinion of Mr. Justice White (Mr. Justice Harlan, Mr. Justice Gray and Mr. Justice McKenna concurring), we find this language:

> "Nor does it seem to me that the decisions of the Minnesota Courts, which are referred to as showing that under the Constitution of that State it was competent for the Legislature to enact a gross receipt tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. *In no single one of these cases was the question of irrepealable contract presented, considered, or decided in any form.*"

The line of decisions thus closed by the Traverse County case (disregarding now the Luther and Stearns cases) began with the Parcher case in 14 Minn. 297 (Gil. 224).

The issue in that case was as to the exemption of the granted lands from ordinary taxation. It was held that this exemption had passed from the Minnesota and Pacific Company, to the State; thence to the St. Paul and Pacific Company, and finally to the First Division Company. *The exemption could not have been held appendant to the railroad, for when the property was transferred to the State, and again when it was regranted to the St. Paul and Pacific Company, there was not a mile of road to which it could attach.*

In addition to this very compelling fact, the language used by the Court (page 253) shows that the right was regarded as appurtenant to the lands, and not to the lines. They said:

> "And as it was not a personal and inalienable right, there is no reason why it would not pass with the lands, and as appendant thereto, to the State."

Again it is stated that certain facts were not without weight in considering whether the *grant of lands, without the exemption* would have induced the building of the lines.

The case of

State ex rel. Marr v. Stearns, 72 Minn. 200,

decided May 11, 1898, was the first case in which the question of an irrepealable contract right in the gross earnings tax law was presented. The claim was denied by this Court, and, although its decision was reversed, the Supreme Court of the United States did not hold that there was an irrepealable contract.

> Stearns v. Minn. ex rel. Marr, 179 U. S. 223, 45 L. Ed. 162.

The Stearns case involved the validity of the so-called Anderson Law, G. L. 1895, Chapter 168, whereby it was attempted to tax railroad lands in the ordinary way. The Minnesota Court sustained the law. The United States Supreme Court held it invalid. Four of the Justices, speaking through Mr. Justice Brewer, held that, independently of its Constitution, it was competent for the State as a trustee of the lands, to transfer them to the railroad companies with an exemption from ordinary taxation.

Mr. Justice Brewer, speaking for this Court with reference to the Amendment of 1871, said:

> "The constitutional amendment of 1871 forbade any change by repeal or amendment of laws respecting the taxation of railroad companies except upon a vote of the people. The converse of that proposition may be accepted, to-wit: that by a vote of the people the tax provision concerning railroads might be repealed or amended. But is there no limitation upon the power of amendment?" Idem p. 238.

Four of the Justices, speaking through Mr. Justice White, were of the opinion that the State had the right to repeal or amend the gross earnings laws, but that such right did not justify the withdrawal of the lands from the protection of the laws, while continuing the full obligation as to all other railroad property. Mr. Justice Brown alone suggested that it was too late to question the validity of the gross earnings tax laws. And even he did not seem to contemplate the possibility of the State's being prevented from increasing the rate.

Prior to the enactment of the Anderson bill in 1895, there was no law specifically attempting to tax railroad lands. In the Parcher, Stevens County and Traverse County cases, the question was

whether, without such a law, the lands were subject to ordinary taxation. *Until the Legislature attempted to change the law, which it did not do until* 1895 *by the Anderson bill, no question could or did arise as to its right to do so. Therefore, such right was not involved in any decision prior to the Stearns case.* Until then, this Court not only did not pass upon the question, but had no proper occasion for doing so.

Some statements there are, and they are all prominently quoted in the plaintiff in error's brief, which seem to sustain the claim that the three per cent gross earnings tax privilege is appurtenant generally to the railroad. Such statements, upon examination, are found to be *obiter*. At most they can only be construed with reference to the land grant exemption. They are the result of a failure to distinguish between the privilege as an appurtenance continuing as long as the laws remained unchanged, and the same privilege as a contract right, protected from any change.

For an example of such a statement, ignoring the distinction just indicated, see the concluding sentence of the decision in

State v. St. Paul, M. & M. Ry. Co., 30 Minn. 311.

There is no decision of our Court that the three per cent tax provision of the Minnesota and Pacific charter has descended to the Manitoba Company, or that a similar privilege has inured to the benefit of any other company, as an irrepealable contract right.

(a) NO IRREPEALABLE CONTRACT RIGHT WITHIN THE PROTECTION OF THE IMPAIRMENT CLAUSE OF THE FEDERAL CONSTITUTION CAN ACCRUE TO THE PLAINTIFF IN ERROR ON THE FAILURE OF THE STATE COURT TO FOLLOW THE DECISIONS OF THIS COURT.

Be it remembered that the one thing before the Court in the Stevens and Traverse County cases was the taxing provision as far as it covered the land grant. As has been pointed out, there was a specific exemption of the land grant, and the commuted tax paid the tax on the railroad property generally. See Todd County case, 38 Minn. 163.

In so far as the language used by the Court, by its terms may be held to include the entire taxing provisions, both the gross earnings tax and the land exemption in the Stevens and Traverse County cases, and in so far as it may be held to include the per centum tax as covering the person of the company, or any successor, certainly this Court is not bound by the failure of the Minnesota Court to adopt and apply the law of this Court regarding such successorship. No contract right or rule of property can accrue within the protection of the impairment clause of the Federal Constitution by the failure of the State Court to follow the law as laid down by this Court.

Shelby County v. Union, Etc. Bank, 161 U. S. 151.

Citizens' Saving Bank v. Owensboro, 173 U. S. 648.

VII.

EVEN THOUGH THE DECISIONS OF THE SUPREME COURT OF MINNESOTA WERE TO THE EFFECT CLAIMED FOR THEM BY THE PLAINTIFF IN ERROR, THEY WOULD NOT BE CONTROLLING, WHETHER UNDER THE RULE OF ESTOPPEL, RES JUDICATA, STARE DECISIS OR RULE OF PROPERTY.

A detailed examination of the Minnesota cases bearing upon the case at bar will be reserved for a separate subdivision of this brief. Suffice it here to set forth certain rules deemed to be applicable under the above heading.

We must bear in mind that this is a direct action by the State of Minnesota for the recovery of gross earnings taxes. It is the feature of gross earnings taxes in Minnesota that they are payable directly into the state treasury. Chapter 253, General Laws 1905. Section 1003 et seq., Revised Laws of Minnesota, 1905.

Personal property taxes and taxes upon real estate upon general lists are paid directly into the county treasury. Section 878, et seq., Revised Laws 1905.

It must be conceded that the case at bar stands alone as a direct action by the State for the recovery of gross earnings taxes, and likewise stands alone in respect to the issue raised by the answer as to the right of the State to increase the rate of gross earnings taxes.

As a preliminary statement respecting the authorities relied upon by the plaintiff in error, as constituting an estoppel, a rule of property, res judicata and stare decisis against the State, it is proper here to note that such decisions involved, among other inapposite things, and that was the thing decided,

1. Whether the grants of lands in aid of railroads were exempted from ordinary taxation.

First Div. Co. v. Parcher, 14 Minn. 297 (Gil. 224).

County of Stevens v. Manitoba Co., 36 Minn. 469.

County of Traverse v. Manitoba Co., 73 Minn. 417.

State v. Luther, 56 Minn. 156.

2. Whether taxable gross earnings included rentals; in short the definition of gross earnings.

State v. Manitoba Co., 30 Minn. 311.

3. Whether a special assessment for a local improvement can be imposed against the real estate of a railroad company.

City of St. Paul v. St. Paul and Sioux City R. R. Co., 23 Minn. 465.

First Div. Co. v. City of St. Paul, 21 Minn. 526.

4. Whether a lessee having running rights was liable to pay the tax on the gross earnings derived from the operation of the leased line.

State v. N. P. R. R. Co., 32 Minn. 294.

5. Whether the exemption from taxation in lieu of the gross earnings tax obtained as against large tracts of timber land purchased by the company, from which to take timber to be converted into ties and timber to be used by the company.

County of Todd v. Manitoba Co., 38 Minn. 163, (179 U. S. 237).

6. Whether by a separate statute so providing, the state may tax unused railroad lands upon general lists.

State v. Stearns, 72 Minn. 200 (179 U. S. 305).

(A) THE QUESTION OF ESTOPPEL AND RES JUDICATA.

Relying upon the doctrine of estoppel by judgment, or res judicata, the plaintiff in error in the trial court introduced the judgment of the court in the Parcher, Stevens County and Traverse County cases. The judgment in said actions having arisen upon different demands and between different parties, involving different issues, as has been pointed out, supra, it is submitted that the points in said decision are not binding here. In short the thing has not been adjudicated so as to be a bar now.

The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action, upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action is well stated in the case of Cromwell v. County of Sac, 94 U. S. 351.

"This was an action on four bonds of the County of Sac, in the State of Iowa, each for $1,000, and four coupons for interest attached to them, each for $100. The bonds were issued in 1860, and were made payable to bearer, in the City of New York, in the years 1868, 1869, 1870 and 1871, respectively, with annual interest at the rate of ten per cent a year.

To defeat this action, the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by one Samuel C. Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit."

As bearing upon the relation of the first judgment as an estoppel against the prosecution of the second action, the court said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an aboslute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that per-

fect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upan any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

"It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some

opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

Nor can counsel for plaintiff in error claim the former decisions as the law of the case for such doctrine only obtains in the same action upon a new trial as to points in judgment in a former trial.

Bradley v. Norris, 67 Minn. 48.

An adjudication is conclusive only as to those matters capable of being controverted between the parties at the time and as to conditions then existing, and cannot operate as an estoppel to another action or proceeding, which, though involving the same rights passed upon, is yet predicated upon facts which have arisen subsequent to the former adjudication.

24 Am. & Eng. Encyc. of Law, page 777.

Guilford v. Western Union Tel. Co., 59 Minn. 332, (50 Am. St. Rep. 407.)

So, for obvious reasons, a judgment cannot be conclusive as to a matter which was not in issue in a former action and which could not properly have been litigated therein.

24 Am. & Eng. Encyc. of Law, page 775.

"The conclusive character of a judgment extends only to identical issues, and they must be such not merely in name, but in fact and in substance. If the vital issue of the latter litigation has been in truth already determined by an earlier judgment, it may not

again be contested, but if it has not,—if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language, or by a common form of expression,—then the truth is not excluded, and the judgment is no answer to the different issue."

Village of Wayzata v. Great Northern Ry. Co., 67 Minn. 385.

"It is well settled that, in order to render a matter res judicata, there must be a concurrence of the four conditions, viz: (1) *Identity in the thing sued for;* (2) *Identity of the cause of action;* (3) *Identity of persons and parties to the action, and* (4) *Identity of the quality in the persons* for or against whom the claim is made."

Lyon v. Perin Mfg. Co., 125 U. S. 700.

These rules may be subject to limitations, such as different causes of action, or identity of issues, but such limitations are all inapposite here.

Railroad Co. v. United States, 168 U. S. 1, 48.

(B) THE QUESTION OF STARE DECISIS AND RULE OF PROPERTY.

While not the same, a certain analogy exists between the doctrines of estoppel, res judicata, law of the case, stare decisis and rule of property. Accordingly what is said under the several subdivisions of this argument, has to do with the general question whether the state is barred in the instant case by the decisions of the Supreme Court of Minnesota relied upon by the plaintiff in error. It is not insisted that the statements of principles are

collated under the sub-headings with absolute precision.

The limitations of the rule of stare decisis are thus stated in Wells on Res Adjudicata and Stare Decisis:

> "Nevertheless, the rule must not be so rigidly pressed as to shield error needlessly, or shut out advanced knowledge. * * * And so, if even a rule of property is established by a series of decisions resulting, however, in a dangerous monopoly, and in effect setting aside a wholesome provision in the constitution designed to suppress such abuse of the rights of property, the rule thus established may properly be abrogated by overruling the decisions under which it grew up to so dangerous and overwhelming an influence in contravention of public policy. And although prior decisions are not lightly to be departed from, yet any error may be corrected when no substantial injury is to be expected from the change, or when the evils of adherence are manifestly greater than those of departure. * * * Where this (the error) is clear and a plain rule of law is manifestly violated, and especially if the rule established is mischievous rather than beneficial to the community at large, in its practical operations, * * * it should be abrogated without delay."

In the 26th *Am. & Eng. Ency. of Law*, second edition, page 183, there is this statement:

> "This doctrine is not an arbitrary rule of positive law which forbids the questioning, under any circumstances, of all decisions or the exercise of judicial discretion in relation thereto, but is subject to reasonable limitations. There are clear and palpable mistakes of law which should be corrected, especially when it can be done without injury to any person or property. If no injury or injustice would re-

sult to any one, and a future and permanent benefit would undoubtedly result, the correction should be made at once. No prior decision is to be reversed without good and sufficient cause, yet the rule is not in any sense iron-clad, and the future and permanent good of the public is to be considered rather than any particular case or interest. Even if the decision affects real estate interest and titles, there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well settled principle of law can be violated by any decision for any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. Whenever a correction can be made without working more harm than good, it should be done."

Chancellor Kent, in volume 1 of his Commentaries, on page 477, makes this observation:

"But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of report which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency depending upon the consideration of the importance of certainty in the rule, and the

> extent of property to be affected by a change of it."

Disposing of the contention that a former decision has established a rule of property, the Supreme Court of Minnesota has said, speaking through Mr. Justice Mitchell:

> "It is an elementary principle that an erroneous decision is not bad law; it is no law at all, and never was the law. It is the law of the particular case, and is binding on the parties before the court, but does not conclude other parties having rights depending upon the same question."

In *Boyd v. Alabama*, 94 U. S. 645, it was held that a decision in a former case to the effect that a statute constitutes a contract, and that an act repealing it is void is not an estoppel to a subsequent decision holding that the former statute itself is unconstitutional.

In *Adams v. Yazoo, etc., Ry. Co.*, 77 Miss. 194, 60 L. R. A. 33 (affirmed 180 U. S. 1, 45 L. Ed. 395), there was under consideration the question as to whether a railroad company had been granted immunity from taxation. Under the uniformity clause of the State Constitution it was held that the State could not make such a grant. In arriving at that conclusion certain other cases were overruled, *inter alia*, Miss. Mills v. Cook, 55 Miss. 40. With respect to decision in that case the Court said:

> "We have all proper respect for the doctrine of *stare decisis*, but it is a doctrine not inflexi-

> ble, and departed from over and over by the wisest courts in proper cases. If the doctrine *stare decises* can be disregarded in proper cases, where the question is one merely of property rights between individuals, how much stronger is the reason for disregarding it when so to do results, as here, in restoring to a sovereign state the right to tax corporations and make them bear their just share of the burden of that government whose protection they so constantly and persistently invoke. The distinction is not one of our own invention. It is well settled in law, and it was voiced in words which we can quote, to approve, by Chief Justice George, in Lombard v. Lombard, 57 Miss. 177. He said:
>
> 'Speaking for myself alone, I would say that on constitutional questions where the former decisions refused a right reserved to individuals as against the power of the government, or where it impaired the powers of the people or their representatives to prevent maladministration by their officers and agents, or sanctioned an alienation by the legislature of powers conferred for the public good, I should feel little hesitation in departing from it, when satisfied of its incorrectness.'"

In *People v. McCreery*, 34 Cal. 432, the question under consideration was the validity of a law exempting property from taxation under a constitutional provision in these words:

> "Taxation shall be equal and uniform throughout the State. The property of this State shall be taxed in proportion to its value, to be ascertained as directed by law."

The law was held unconstitutional, the Court overruling *People v. Coleman*, 4 Cal. 46, and *High v. Schoomaker*, 22 Cal. 302, and saying with respect thereto:

> "For the learned justices who united in the decisions we have great respect; and we would readily and willingly yield to the authority of their decisions in cases where the construction of a constitutional provision is involved in doubt. But when the language of the Constitution is, as we find it in this section, clear and free from ambiguity or doubt, we must yield to the Constitution as the paramount authority."

Many of the dicta found in the decisions of the Supreme Court of Minnesota, which are claimed to bear upon the issues in this case, are subject to the following rule:

> "It is a maxim not to be diregarded that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."
>
> Cohens v. Virginia, 6 Wheaton, 399, 5 L. Ed. 290.

For an exemple of erroneous decisions set aside, even though claimed to constitute a rule of property, see

Remey v. Iowa Central Ry. Co., 89 N. W. 218.

The Court said, on page 222, that even though

the old decisions did constitute a rule of property, they could not be too quickly overruled.

On the question whether by the former decisions of the Supreme Court of Minnesota, contract rights have accrued which are within the protection of the Federal Constitution, the following excerpt seems in point:

> "The defendant insists that his rights having been acquired when these decisions of the highest court of Kentucky were in full force, should be protected according to the law of the State as it was adjudged to be when those rights attached. But is this court required to accept the principles announced by the state court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the state legislatures? Clearly not. The defendant invokes the jurisdiction of this court upon the ground that the rights denied to him by the final judgment of the highest court of Kentucky, and which the state seeks to prevent him from exercising, were acquired under an agreement that constituted a contract within the meaning of the Federal Constitution. This contention is disputed by the State. So that the issue presented makes it necessary to enquire whether that which the defendant asserts to be a contract was a contract of the class to which the Constitution of the United States refers. This Court must determine—indeed, it cannot consistently with its duty refuse to determine—upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract the obligation of which is protected by that instrument against hostile state legislation."
>
> Douglas v. Kentucky, 168 U. S. 488, 501; cases cited.

Whether a railroad gross earnings tax can be increased from three to four per cent. has never been brought before the Supreme Court of Minnesota until in the case at bar. It would seem that this fact alone should exclude any rule of *stare decisis* or rule of property as a bar in the instant case.

If it be held that the Supreme Court of Minnesota in the case at bar has reversed the former decisions now relied on by the plaintiff in error, then it is insisted that such course was necessary and proper in order to uphold constitutional provisions. In such cases there can be no choice between the erroneous decision and the mandates of the Constitution. Assuming that the analogy exists, attention is called to the decision of the Supreme Court of California in People v. McCreery, overruling People v. Coleman, and High v. Schoomaker, *supra;* and to the decision of the Supreme Court of Mississippi in Adams v. Yazoo Railway Co., overruling Mississippi Mills v. Cook, *supra;* and to the decision of the Court of Appeals of Kentucky in Citizens Saving Bank v. Owensboro, 19 Ky. L. Rep. 248 (affirmed 173 U. S. 636), overruling Bank Tax Cases, 97 Ky. 597.

In the Mississippi and Kentucky cases the setting aside of the former decisions was approved by the Supreme Court of the United States. In the latter case that court said (173 U. S. 648):

> "As we conclude that the decision (of the State court) in the Bank Tax Cases above cited, upon the question of contract, was not

only in conflict with the settled adjudications of this court, but also inconsistent with sound principle, we will not adopt its conclusions."

Where the question is one of which the Supreme Court of the United States has appellate jurisdiction upon a writ of error to a state court, the decisions of the former upon the questions are binding upon the state tribunals and will be followed by them.

26 Am. & Eng. Ency. of Law, page 176. Cases cited.

That the decisions relied on by the plaintiff in error cannot constitute a rule of property will more fully appear on an analysis of said decisions, *in fra.*

VIII.

THE MINNESOTA CASES DO NOT CONSTITUTE A BAR AS A RULE OF PROPERTY OR OTHERWISE IN THE INSTANT CASE.

As a preliminary to the critical examination of the Minnesota cases as a bar to the present action and determinative thereof, it is well to note that mere dicta, expressions of opinion by the Court on matters the disposition of which was not required, create no estoppel.

Barney v. Winona, etc., Co., 117 U. S. 231.

When a point is not raised or considered on a former appeal, the appellate court has been held not bound.

Balch v. Haas (C. C. A.) 3 Fed. 977;
Pa. Co. v. Bond, 202 Ill. 995.

When a decision is considered to be antagonistic to the express provisions of the Constitution of the State, the doctrine of *stare decisis* cannot be invoked to sustain such decision.

Higgins v. Bordages, 88 Tex. 458 (53 Am. St. Rep. 770).

Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty as well as the right of the court to consider them carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy and it would be an egregious mistake to allow more harm than good to accrue from it.

26 Am. & Eng. Ency. of Law, page 184.

The weight of a judicial decision may depend in a considerable degree upon whether or not the point ruled upon was urged and discussed before the court.

Idem. page 170, cases cited.

It is not to be tolerated that the state should be forever debarred of its taxes by an erroneous decision.

Adams v. Yazoo Co., 60 L. R. A. 80.

(a) MINNESOTA CASES CHRONOLOGICALLY CONSIDERED.

Huff v. Winona & St. Peter R. R. Co., 11 Minn. 180 (Gil. 114).

This case, decided in 1866, involved but the one question whether the Winona and St. Peter Railroad Company was the same corporation as the Transit Railroad Company and therefore liable for the debts of the latter. The case depended upon the construction and effect, not of any territorial charter, but of an act of the legislature approved March 10, 1862. It was held that the new company organized under that law was not the same corporation as the Transit Company and was not liable for its debts. This was the only question decided and the only one touched upon in the opinion. The question of an irrepealable contract was not presented or suggested and the judgment of the court in no way depended upon any question of that nature.

The Parcher Case, 14 Minn. 297 (Gil. 224).

Respecting said case the Supreme Court of Minnesota observes:

> "The Parcher case involved the right of the state to tax the land grant in addition to enforcing the earnings tax, and, while the court discussed at some length the contractual relations arising from the Minnesota and Pacific charter, it finally reached the pivotal question before it and held that the specific examination of the land was valid and upon that conclusion based its decision. The result of that decision

is in full harmony with the view that the examination of specific property donated to the railroad company for a specific purpose attached to the land, and was not, like the earnings system, a personal privilege to the grantee."

(Trans. page 357.)

As a preliminary to the above, the Court had observed:

"Two distinct provisions on the subject of taxation were embodied therein (the Charter), the first provided for a gross earnings tax in lieu of all other taxes and assessments and, second, an exemption of the land grant until sold or contracted to be sold by the company."

(Trans. page 350.)

And again:

"A distinction must not be overlooked, when considering the assignability of tax exemption between those imposing a commuted system in lieu of property taxes and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land is granted to a railroad company to aid in the construction of a railroad, and is specifically exempted from taxation until sold by the company, and the company accepts in consideration of the exemption, the exemption attaches to and follows the land. State v. New Jersey v. Wilson, 7 Cranch, 164, 3 L. Ed. 303; State v. Hicks, 9 Yerg. (Tenn.) 486, 30 Am. Dec. 423; International v. State, 75 Tex. 356, 12 S. W. 685. In such case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land

to a succeeding corporation assuming the burden attached to it." (Trans. 353.)

The Parcher case was decided in 1869. We call the attention of the Court to the complaint. (Trans. page 252.) The case was decided upon the demurrer to the complaint and went to final judgment thereon.

In view of the fact that this decision is claimed to have established a rule of property to the effect that the railroad company has an irrepealable contract right to the three per cent. gross earnings tax and that the same was appurtenant to the railroads, the following facts disclosed by the complaint are worthy of notice:

The facts referred to are these:

(1) Section 18 of the Charter of 1857 is neither referred to as, nor claimed to be a contract or a grant of the alleged exemption of the lands from taxation. (2) The Act of March 4, 1865, is the only law which is referred to or claimed as the grant of the alleged exemption. (Trans. page 262.) (3) There is no suggestion anywhere in the complaint that the exemption was enjoyed by virtue of any contract. (4) It is not claimed that the exemption was perpetual so as to be beyond the power of the legislature to amend or repeal. (5) The only claim was that, under the laws of the state, the lands were exempt from taxation until sold or conveyed.

The prayer of the complaint was that the defendants, the auditor and treasurer of the county,

should be enjoined from taking any steps to tax the lands, thereby clouding the title. No other relief was asked. The writ of injunction as prayed for was the only relief ever granted and the judgment of the court, aside from finding the allegations of the complaint true, went only to the extent of declaring the lands in question exempt from taxation (Trans. page 263). It is thus seen that the examination of the complaint in the Parcher case is all that is necessary to demonstrate the utter lack of foundation for the claim now made that it constitutes a rule of property, binding upon the state, as against the right of the state to assert that there is no irrepealable contract right vested in the plaintiff in error, which is protected from impairment by the contract clause of the Federal Constitution.

The several allegations of the complaint went rather to the establishment of the corporate capacity of the First Division Company and its right to bring suit.

Finally the points in judgment are—"First. That upon the allegations of the complaint, 'First Division of the St. Paul and Pacific Railroad Company' is a corporation and authorized to sue and be sued as such. Second. That upon the same allegations, it is entitled to hold such of the lands granted by the United States to the territory by Act of Congress of March 3, 1857, as it has become vested with under the laws and proceedings hereinbefore referred to, exempt from taxation, until

the same are sold and conveyed by it." First Div. Co. v. Parcher, 14 Minn. 232.

State v. Winona & St. P. R. R. Co., 21 Minn. 315. Decided January 11, 1875:

"The case of State v. Ry. Co., 21 Minn. 315, again presented the taxability of the land grant, and the decision was placed squarely upon the clause of the charter of May 22, 1857, which is therein quoted, that the lands granted by the state 'shall be and are exempted from all taxation until the same shall have been sold and conveyed.' The other cases also involved solely this specific exemption. The question whether the provisions of the charter respecting the gross earnings tax constituted an irrevocable contract was not before the court in either of the older cases and a consideration thereof was wholly unnecessary to the result reached. Such appears to have been the view of Mr. Justice White (with whom concurred Justices Harlan, Gray and McKenna), in Stearns v. State, 179 U. S. *supra*, for he there said: 'Nor does it seem to me that the decisions of the Minnesota courts, which are referred to as showing that under the Constitution of that state it was competent for the legislature to enact a gross receipt tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. In no single one of these cases was the question of irrepealable contract presented, considered, or decided in any form.'

What was said in the opinion in State v. Ry. Co., 21 Minn. 315, in reference to the case of Trask v. McGuire, *supra*, should be given no greater force or effect than the decision of a question now claimed to have been determined but which was not before the court." (Trans. 358.)

First Div. Co. v. City of St. Paul, 21 Minn. 526. Decided May 14, 1875.

This case involved the liability of the railroad company to pay assessments for local improvements attempted to be imposed upon certain of its lands in the City of St. Paul. The company's claim is thus stated on page 527:

> "The first division of the St. Paul and Pacific R. R. Co. appeared in court claiming that it was the owner of the land, that it occupied and used the same for the purposes of its railroad, that the land formed no part of the company's land grant, that the company had paid into the state treasury all sums required by law in lieu of taxes and assessments, and that the land was therefor exempt from all taxes and assessments whatsoever, including the assessment then sought to be enforced against it."

Said cause came to the Supreme Court by *certiorari* to review the action of the District Court. The only question before the court was the meaning of the language contained in the Territorial Charter, to-wit: "The said company shall be forever exempt from all assessments and taxes whatever." The Court held this included local assessments.

Chicago, M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217.

"The Pfaender case involved solely the question whether the railroad was liable for a two or a three per cent. tax on its earnings." (Trans. page 357.)

The question which the decision turned upon was thus stated by Mr. Justice Cornell:

> "It is conceded that the point presented for decision in this case depends entirely upon the true meaning and construction of the fourth and fifth proviso of Section one of the Act of March 2, 1865, entitled 'An Act to aid and facilitate the completion of the St. Paul and Pacific Railroad and its branches.'
> Sp. Laws, 1865, C. 6."

Because the line was one of those authorized by the Minnesota and Pacific Charter and therefore within the intended scope of the Act of March 2, 1865, it was held that the defendant was liable to the three per cent. tax.

The second paragraph of the opinion is in part as follows:

> "It is also *admitted* that these provisos were enacted as amendatory of section 18 of the original charter."

Attention is called to this because, it being *admitted* that the Act of March 2, 1865, was amendatory to the original charter, this language so used by the court is in no way binding now as against a holding that the new law was a repeal of, and substitute for, section 18 of the charter of 1857.

In view of the narrow nature of the issue, as defined by Mr. Justice Cornell in the language above quoted, we submit that the language found on page 224, to the effect that the immunity was not simply a personal privilege but a right appurtenant to its lines or road, is entirely *obiter*.

There was no question in the case as to the con-

stitutionality of the Laws of 1865. The only question was as to their "true meanings and construction."

City of St. Paul v. St. Paul and Sioux City Railway Company, 23 Minn. 469.

Again in this case, decided March 30, 1877, the question was as to whether certain lots belonging to the defendant and used by it for railroad purposes were liable to assessments for local improvements. The judgment was to the effect that the land in question was exempt from such assessments. The question again was as to the *construction and meaning* of the statute.

Like the case of the First Division Company v. St. Paul, *supra*, it was not necessary for the court to go beyond the question of statutory construction in order to reach its decision. Nothing else was necessarily involved. Therefore the reference on page 473 to the Parcher case, to the effect that the First Division Company and *its successors* were exempted from local assessments is clearly *obiter*.

County of Nobles v. Sioux City & St. P. R. Co., *26 Minn. 294*.

This case was decided December 5, 1879, and was a proceeding for the collection of taxes assessed on the defendant's lands. It was claimed on behalf of the County that the exemption from the taxation of the lands in the ordinary way had been lost by the transfer of an unconstructed portion of

the line and the land grant pertaining thereto, the purchasing company to construct and equip such portion of the line.

The exemption of the lands while belonging to the original company was not questioned. It was only claimed that the exemption was lost by the arrangement resulting in the transfer to the defendant. It was held that the transfer was not a sale and conveyance within the meaning of the Act of May 22, 1857, exempting the lands from taxation "until sold and conveyed."

In support of the argument contained in part VI, supra, to the effect that our Court has never been of the opinion that the exemption of the lands from ordinary taxation was intended to have been vested in any company which had not earned the same and had not constructed a part of the road to which the granted lands were appurtenant, we call the court's attention to the following language of the Court in this case, found in 26 Minn. 297-8:

> "The general purpose of that act, as also of the Act of March 4, 1864, was to secure the construction of the road with the lands granted by the act of congress for that purpose. It was contemplated that the road, if constructed at all, would from necessity be constructed mainly, and perhaps for a time maintained, from the proceeds of sales of the lands; that the lands would not produce any revenue except from sales, that it might be a considerable time before they could be sold, and that if in he meantime they should, by being subject to assessment and taxation, be a source of expense to any company holding them, the company to which the lands were offered would be less likely to accept the grant, and undertake

the construction of the road. As an inducement to the company to enter upon the enterprise, the exemption from taxation was created.

All the acts of the legislature, from first to last, show it was intended that this exemption should exist in favor of any company which, in consideration of the land grant, should assume the construction and maintenance of the line to which it was applicable. It is so expressed in the Act of May 22, 1857, in respect to the Root River Valley & Southern Minnesota Company, and in the Act of March 4, 1864, in respect to the Minnesota Valley Company; and in the Act of 1869 the authority given to the latter company to transfer to the Sioux City & St. Paul Company, not the lands merely, but 'so much of the line and land grant,' implies that the company so authorized might pass to the other all the benefits, together with the burdens, of the grant of land made by the State."

State v. St. Paul, Minneapolis and Manitoba Railway Company, 30 Minn. 311.

This decision was handed down on March 19, 1883, and the syllabus correctly and fully indicates the only question which was considered or decided, and is as follows:

"The 'gross earnings' upon which three per centum is to be paid to the state in lieu of taxes, under the charter of this defendant (Laws 1857, Ex. Sess. C1, Subc. 1), do not include the compensation paid to it by another company for the right to run trains over its lines."

The action was commenced by the state to recover the three per cent. tax on $40,000.00 which the defendant received from the Northern Pacific

Railroad Company as a rental for the use of that portion of its road from Sauk Rapids to St. Paul and from St. Cloud to East St. Cloud. The case was submitted to the District Court on stipulated facts whereby it was *admitted* that the defendant had paid as taxes, *under the law* of 1857, three per centum upon its gross earnings, not including the $40,000.00 above referred to. Judgment was entered for the defendant and on appeal by the plaintiff the same was affirmed. The narrowness of the issue and the consequent restricted nature of the judgment are shown by the opening paragraph of the opinion:

> "The only question in this case is, does the $40,000.00 per annum which the Northern Pacific Railroad Company pays to defendant for the right to run its trains over defendant's lines from Sauk Rapids to St. Paul, and from St. Cloud to East St. Cloud, and from Minneapolis (west) to East Minneapolis, come within the term of 'gross earnings' upon which, according to the act from which the defendant derives its existence three per centum is to be paid in lieu of taxes?"

Inasmuch as it was *admitted* that the defendant was paying taxes under the charter of 1857, this decision is no bar to this Court's holding that all taxes have been paid by the defendant and its predecessors under the Act of March 2, 1865.

The question involved only the construction of certain language in the charter, under which it was admitted that the taxes were payable. This law referred to "all receipts and expenditures on account of the operation of said railroads" as the

basis of the accounting for purposes of taxation. Construing this language, the court held that the receipts from operation were the only ones to be taken into account between the company and the State, and that the exaction of three per cent. upon the rent and also upon the receipts by the tenant earned by operating the railroad "would be, to the extent of the rent, in the nature of double taxation, or rather of exacting twice the commutation for taxes on the same property."

Having stated fully the conclusion of the court, and the reasons therefor, the learned Chief Justice lapsed into the following generalization:

> "Leasing or selling the railroad cannot affect the rights of the state. Into whose hands soever the railroad may pass, and whoever may receive the gross earnings, the obligation to pay and the right of the state to receive the three per centum on such gross earnings are unimpaired. Such earnings still furnish the measure of such obligation and right."

The quoted excerpt is a favorite text of the plaintiff in error. An examination of the opinion shows, however, that said excerpt is entirely *obiter*. It had no connection with the decision which was reached, which was not to the effect that the leasing company was obligated to pay the taxes, but that the lessor company did not incur any taxes on account of the rentals received by it.

Attention is also called to the fact that the Manitoba Company in said case was paying taxes under the Act of March 2, 1865, which act in truth and in fact was the act the construction of which was

before the court, and which latter act did not contain the language "all receipts and expenditures *on account of the operation* of said railroads" on which specific language the decision seemed to turn.

State v. Northern Pacific Railroad Company, 32 Minn. 294.

This is the sequel to the case last referred to, and was decided the next year (July 18, 1884). In the case against the Manitoba Company the State sought to recover the gross earnings tax on the rental received by the lessor. In this case the effort was to recover three per cent. of the defendant's gross earnings for the year 1881 derived from its operation, as lessee, of the line between St. Paul and St. Cloud, that being the same line covered by the lease or contract referred to in the last case. "The defendant, in its answer, denied that it had any possession or control of the line, and relied on Sp. Laws 1870, c. 65."

The District Court ordered judgment for the plaintiff and the same was affirmed on appeal.

In this case it was again assumed that the Minnesota and Pacific Charter was the only law which governed as to taxation, the Act of March 2, 1865, being entirely overlooked. The opinion does not contain any suggestion that the latter act was in any way presented to, or considered by, the Court.

It was held that the obligation imposed by the Minnesota and Pacific Charter operated to compel the Northern Pacific Railroad Company to pay the

three per cent. tax upon its gross earnings derived from the operation of the road in question, which was a part of the Minnesota and Pacific charter lines. It was also held that there was nothing in Chapter 65 of the Special Laws of 1870 which would operate to exempt the defendant from such obligation. In so far as it went beyond the consideration of the effect of this Special Law it seems that the opinion must be considered as *obiter* for the reason that the issue raised by the defendant was simply (as stated by the Court on page 296),

> "That no such estate or interest passed to it by the contract * * * and that if the contract did pass such estate or interest, it was exempted, without the obligation to pay the percentage, by Sp. Laws 1870, c. 65, sec. 1."

This statement of the defense makes it apparent that there were but two questions presented, one as to the meaning and effect of the contract, and the other as to the meaning and effect of the Special Law referred to.

There is absolutely no suggestion in the opinion, and it does not appear therefrom that it was suggested by either of the litigants, that either of the contracting companies had any contract right in the Minnesota and Pacific Charter or under any other gross earnings law.

The Stevens County Case, 36 Minn. 467.

Decided March 2, 1887, involved simply,

> "The question of the taxability of the estate or interest which the St. Paul, Minneapolis and

> Manitoba Railroad Company had in its lands after the same had been contracted to be sold, but before payment of the purchase price, or the performance of the contract conditions so as to entitle the purchaser to a conveyance."

As we have heretofore indicated, the case was heard on the answer of the company which was stipulated to be true. The Court was thereby prevented from considering whether or not the exemption assumed to exist in favor of the First Division Company ever passed to the Manitoba Company. For the same reason it did not consider the constitutionality of Chapter 412, Special Laws 1881, whereby it was attempted to confirm the organization and purchase of the Manitoba Company. Of course for the same reason it was unnecessary to consider the constitutionality of Chapter 30 of the General Laws of 1876, under which that company was organized.

The reference on page 471 to the contract right of the original company is manifestly *obiter*, for the question before the Court was not to the nature of the law as a contract or otherwise, but as to its construction with respect to, and its effect upon, the taxation of the lands in question. The comment at the bottom of page 471 and on page 472 with respect to the constitutionality of laws passed by the state legislature providing for gross earnings taxation, and to the effect that such laws were valid, has since been disapproved, it having been decided that the gross earnings laws were invalid until ratified by the constitutional amendment of 1871.

The Stevens County case has been extensively referred to and quoted from in the briefs, *supra*, and needs no further analysis. The distinguishing feature of it is that, even though they had been involved, the Court was prevented by the stipulation of facts from considering the questions which are being urged upon the Court's attention in the present litigation.

County of Todd v. St. Paul, Minneapolis & Manitoba Railway Company, 38 Minn. 163.

Decided February 1, 1888, this case was certified to the Supreme Court in proceedings to enforce the payment of taxes on real estate owned by the defendant but not being a part of its land grant nor used directly for railroad purposes. The question was simply as to whether or not in that situation the lands were exempt from ordinary taxation. It was *admitted* that the defendant had succeeded to the rights, franchises and immunities of the Minnesota and Pacific Railroad Company.

> "As to this," says the Court, (page 164), "No question is raised; nor that the Charter of the Minnesota and Pacific Company is to be referred to as defining the exemption to which the St. Paul, Minneapolis and Manitoba Company is entitled."

This case is a good illustration of how easily and how frequently both the legal department of the State and the District and Supreme Courts have overlooked the Acts of March 2 and March 4, 1865, with respect to gross earnings taxation.

A statement of the issue shows that the only question for decision was as to the construction and effect of whatever law was applicable, and it was admitted that such law was found in the Minnesota and Pacific Charter. Applying the rule of strict construction, the Court held that the lands were not within the exemption from ordinary taxation. No question of contract, irrepealable or otherwise, was before the Court.

State ex rel. Marr v. Luther, 56 Minn. 156.

Decided January 5, 1894, this case also involved the question of whether granted lands were exempt from ordinary taxation, in the absence of any law expressly attempting to subject them to such taxation. The opinion of the Court discusses two questions, the first of which was one of repeal. It was held that the act of March 3, 1865, repealed the act enacted on February 23. In the discussion of this point the Court used language which so fully supports our contention that the Act of March 2, 1865, was a complete substitute for, and therefore a repeal of, Section 18 of the Minnesota and Pacific Charter relating to taxation, that we again quote it here. The language referred to is as follows:

> "It seems to us perfectly apparent that, as respects taxation, the second act was intended as a revision of or substitute for the first, and to prescribe the only rule on the subject. The second act covers all the ground covered by the first, making various changes, some in favor of the State, and others in favor of the company.

> although, as usual in those days, mostly to the latter."

This language fits the act of March 2, 1865, in its relationship to the Minnesota and Pacific Charter and it must follow that the former must be considered as having repealed the latter and as being a new and substituted arrangement.

The next question discussed in the Luther case is the Constitutional Amendment of 1871, and it was held that, assuming the gross earnings laws passed prior thereto to have been unconstitutional, the same were validated by the amendment. The acts in question were held constitutional and it was added that the lands of the St. Paul and Duluth Railroad were exempt from taxation.

In the course of the opinion Mr. Justice Mitchell used language to the effect that there was no remedy against whatever mistake had been made by the State in making "injudicious contracts" (page 161). This *obiter* remark was the occasion for the note added to the opinion upon the denial of the application for a reargument wherein it was said that the remark referred to was not intended to express or intimate any opinion as to whether the laws in question constituted contracts which could not be repealed or amended.

State ex rel. Marr v. Stearns, 72 Minn. 200.

Decided May 11, 1898, this case has already been referred to at such length that no additional comment is necessary here. We take the opportunity,

however, of again emphasizing the fact that it was the first case where this Court was ever confronted with the question of whether or not the legislature had the power to amend or repeal a gross earnings tax law, State or Territorial. There was no proper occasion for passing upon that question, or intimating any opinion with respect thereto until the question of the constitutionality of the Anderson Law, attempting to subject the granted lands to ordinary taxation, was presented to the Court in this case.

The Traverse County Case, 73 Minn. 417.

This decision was handed down July 22, 1898, and has also been extensively referred to and quoted from. All we care to do here is to again direct attention to the fact that, on page 426, in the very paragraph in which reference is made to the effect of the legislation, and decisions with respect thereto, it is expressly stated that

> *"The question whether the legislation on the subject involves the elements of a contract between the defendant or its predecessors and the State is not necessarily involved, and need not now be considered."*

If that question was not involved in the Traverse County case, it could not have been involved in any other case where the question was as to the liability of granted lands to ordinary *ad valorem* taxation in the absence of any law expressly attempting to subject the same thereto. In support of our

assertion that the question of contract was not involved in any of the cases upon which the plaintiff in error seems to place so much reliance, it is impossible to find any weightier authority than the foregoing solemn assertion of the Minnesota Court, made by it in restricting the scope of its decision in the Traverse County Case. That solemn assertion, made in what was really the last of the decisions upon the subject in hand, applies equally to every other case involving the question of the taxation of the granted lands prior to the passage of the Anderson Law. It is a solemn statement that the question of contract was not involved and not necessary to be decided in any of the cases, except the Stearns case.

State v. Duluth & Iron Range Ry. Co., 77 Minn. 433.

Decided October 23, 1899, this case involved questions similar to those in the Stearns case. The Anderson Law, Chapter 168, G. L. 1895, was upheld and the Court declared that the lands in question were taxable.

> "In view of this situation, it cannot be urged with any force that the earlier decisions of the court rightly adjudicated or determined the question of the power of the state to change the rate. The question not being involved in the prior cases, former expressions of the Court were *obiter* and of no binding force or effect as final adjudications. What was said therein is confessedly at variance with the conclusions of nearly all other courts, State and Federal,

> and, inasmuch as the precise question was not necessarily there before the court, we are fully justified in declining to treat them as final." (Trans. p. 358.)

(b) THESE DECISIONS DO NOT CONSTITUTE ANY RULE OF PROPERTY WITH RESPECT TO THE ALLEGED CONTRACT RIGHT OR THE SUCCESSION THERETO.

Having examined the facts of each case and stated the issues, it is now apparent that:

1. As stated by four of the Justices of the Supreme Court of the United States in the Stearns case (179 U. S. 223, 45 L. Ed. 162):

> "In no single one of these cases was the question of irrepealable contract presented, considered or decided in any form."

2. Aside from the two cases involving the Anderson Law of 1895 (State ex rel. Marr v. Stearns and State v. Duluth & Iron Range Ry. Co., *supra*), the question *was not as to the power of the legislature to enact a new law, but as to the meaning and effect of old laws*, e. g. whether they exempted the granted lands from ordinary taxation (Parcher, Stevens County & Traverse County Cases, etc.); or whether taxable "gross earnings" included rentals (State v. St. Paul, Minneapolis & Manitoba Ry. Co.); or whether the lands were exempt from assessments for local improvements (First Division Co. v. City of St. Paul and City of St. Paul v. St. Paul & Sioux City Ry. Co.); or whether a lessee having running rights was liable to pay the tax

on its gross earnings derived from the operation of the leased line (State v. N. P. Ry. Co.), and so on.

3. In no case was the legal incapacity of a new corporation to take a contract immunity, if one ever existed, suggested to, considered, or passed upon by the Court.

4. In those cases where the so-called "immunity" was said not to be a personal privilege, but appurtenant to the lands (e. g. Stevens County and Traverse County Cases), the judgment was not to the effect that it was a contract right. Hence the legal incapacity of the grantee company was immaterial. But, if it was material, legal capacity in the transferee was assumed or conceded to exist. *The point was not contested.*

All that remains is to apply the rules which govern the application of the maxim, "*Stare decisis et non quieta movere.*" These rules are as follows:

1. A decision construing a statute, determining its meaning and giving it effect as an irrepealable contract, is not a bar to a subsequent decision that such statute is unconstitutional.

Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302.

2. If, in a prior action, a different question from that actually determined might have arisen and been litigated, such possible question is not to be excluded from consideration in a second action, even though it be between the same parties.

Keokuk & Western Ry. Co. v. Missouri, 152 U. S. 301, 38 L. Ed. 450;

Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195.

3. No court is bound by expressions in former opinions on points not contested therein.

Cross v. Burke, 146 U. S. 82, 36 L. Ed. 896.

4. The doctrine of *stare decisis* cannot be invoked in favor of decisions on former statutes which were merely similar to, but not identical with, the one under review.

Wood v. Brady, 150 U. S. 20, 37 L. Ed. 981.

5. No unambiguous mandate of the Constitution can be overcome by the erroneous decisions of the courts.

Adams v. Yazoo Co., 77 Miss. 194, 60 L. R. A. 35;

Lombard v. Leonard, 57 Miss. 177;

People v. McCreery, 34 Cal. 432.

6. The reasons given by a court for its decisions do not constitute an estoppel. They are thereafter merely persuasive under the doctrine of *stare decisis.*

Adams v. Yazoo Co., *supra.*

The application of these rules leads to the conclusion that the prior decisions of the Supreme Court of Minnesota are no bar to the instant case. The question is whether there is any irrepealable contract, vested in the plaintiff in error, the protection of which, under the contract clause of the

Federal Constitution, cannot be impaired by Chapter 253, G. L. 1905, which is alleged to be hostile legislation. The decision of this question must be governed by the established principles of constitutional law as the same have been settled by the decisions of the United States Supreme Court.

CONCLUSION.

It is to be observed that Section 18 of the original charter does "not contain any express stipulation that the percentage shall not be increased or diminished, or that the system of taxation shall not be changed to meet new conditions in the future." (State v. Stearns, 72 Minn. 221.)

The language of Section 18 is not that the "said railway and its appurtenances, and all its property therewith connected, shall not be subject to be taxed higher." (S. W. Ry. Co. v. Wright, 116 U. S. 235.)

The language of Section 18 in effect merely is:

(a) In consideration of the annual percentum tax, the railroad property, used for railroad purposes, its stock and capital are forever exempt from taxation on general lists, and

(b) The land grant lands are exempt until sold.

Accordingly in conclusion it follows:

1. Under the rule stated, that the charter of the Minnesota & Pacific Railroad Company,

insofar as pertinent to the subject of gross earnings taxation, did not constitute an irrepealable contract between the territory and the railroad company, which forever bound the territory or future state not only respecting the method of taxation, but also the rate thereof.

If this doubt exists the case must be resolved in favor of the state.

2. In any event the branch lines, including the Extension Line, so-called, were authorized, not by the charter, but by laws of the state, and are subject to the State constitution. No contract right can be impaired as to these portions of the lines.

3. The state was not competent to pass the exemption as an irrepealable contract to any successor of the Minnesota and Pacific Company, particularly the Manitoba Company.

4. The Act of March 2, 1865, repealed Section 18 of the charter and was validated subject to amendment and repeal by the Constitutional Amendment of 1871.

5. Section 18 of the charter was personal to the Minnesota and Pacific Company.

6. The practical merger and consolidation of the Manitoba lines, the Eastern Minnesota Company and the Transcontinental Lines into the Great Northern System, bring the case beyond the purview of Section 18 amounting to a waiver thereof.

7. The power to change the rate of taxation is expressly provided for by the Minnesota Constitutional Amendment of 1871; this court in the Stearns case (179 U. S. 223) affirmed that right, within reasonable limits; and there

being no claim in this case that the changed rate is unfair or unreasonable, it should be sustained irrespective of other features of this case.

8. The facts of this case and the argument supporting the foregoing conclusions are clearly stated in the opinion of the Minnesota court, which for convenience of reference we have printed in full in the annexed appendix.

The case should be affirmed.

Respectfully submitted,

GEORGE T. SIMPSON,
Attorney General,

GEORGE W. PETERSON,
Assistant Attorney General.

APPENDIX.

15994—5.

STATE OF MINNESOTA, SUPREME COURT,

OCTOBER TERM, A. D. 1908.

No. 27-28.

STATE OF MINNESOTA,

Appellant,

vs.

GREAT NORTHERN RY. CO.,

Respondent.

STATE OF MINNESOTA,

Respondent,

vs.

GREAT NORTHERN RY. CO.,

Appellant.

Syllabus.

1. Chapter 253, General Laws 1903, approved at the general election of 1904, as provided by Sec. 32a of Art. 4 of the State Constitution, increasing the rate of the gross earnings tax of railroad companies doing business in this state to four per cent.,

is valid as to defendant and all its lines of road and branches thereof. The statute impairs no contractual or other vested right of defendant and is not repugnant to either the state or the federal constitution.

2. Parcher v. Ry. Co., 14 Minn. 297, and other similar cases, distinguished.

Reversed with directions to enter judgment for the state.

Opinion.

This action involves the validity of Chapter 253, General Laws 1903, approved by the people at the general election of 1904, as provided for by Article 4, Sec. 32a, of the State Constitution, increasing the gross earnings tax upon railroad companies of the state to four per cent. Though the facts and various statutes bearing upon the case, and which controls its determination, have been stated and referred to in prior opinions, a restatement is necessary to an understanding of the present opinion.

By an act approved March 3, 1857, Congress granted to the territory of Minnesota certain public lands to aid in the construction of railroads therein. (Edgerton's R. R. Laws, 82.) The act particularly defined the terms of the grant and expressly provided that the lands thereby granted were subject to the future disposal of the territory or state for the purposes therein expressed and no other. This when accepted created a trust which the territory or future state was bound to carry out in form and spirit as directed by the terms of the grant. For

this purpose the territorial legislature by Chapter 1, Sp. Laws 1857, in effect accepted the grant and provided for the incorporation of the Minnesota and Pacific Railroad Company, and conferred upon it and its successors authority to construct and operate certain lines of railroad within a territory including specified branches, and providing for the conveyance to the company of the lands granted by Congress, substantially upon the terms and conditions imposed by the act of Congress. This act constituted the charter of the railroad company. Its organization was completed, and the company, after formally accepting the act, commenced the construction of the railroad therein provided for. Lack of capital to prosecute the work necessitated a loan by the company and it mortgaged by trust deed its line, all its property and franchise privileges to Elon Farnsworth, and others, to secure the payment of funds thus obtained. This mortgage was executed on *July* 31, 1858, and was supplemented by a second mortgage to the same parties in November, 1858, securing the payment of bonds issued by the company, a part of which were delivered to the state in exchange for its bonds issued under the constitutional amendment of April 15, 1858, to aid in the construction of the road. Edgerton's R .R. Laws, 3. The state bonds, to the amount of $5,000,000, though the company utterly failed to construct the road and the state in fact received no consideration therefor, the state, after a prolonged contest, by the decision of this court in *State ex rel v. Young*, 29 Minn. 474,

was rightly compelled to pay.

Section 18 of the charter of the Minnesota and Pacific Company contained two distinct provisions upon the subject of taxation, in the language following:

> (1) "In consideration of the grants, privileges and franchises herein conferred on the said Minnesota and Pacific Railroad Company, the said Company shall and will, on or before the 1st day of March in each year, pay into the territory or future state, three per centum of the gross earnings of the said railroad * * * and in consideration of such annual payments, the said Company shall be forever exempt from all assessments and taxes whatever by the territory, or state which shall succeed the territory, or by any county, city, town, village, or other municipal authority, upon all stock in said Minnesota and Pacific Railroad Company, whether belonging to said Company or to individuals, and upon all its franchises or estate, real, personal or mixed, held by said Company;" and
>
> (2) "that said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company, shall be exempt from all taxation till sold and conveyed by said company."

The company did not complete the construction of the lines of road provided for by its charter and made default in the payment of the Farnsworth mortgage. Whereupon, on June 3, 1860, the mortgage was duly foreclosed by advertisement in the manner and in accordance with its terms and the statutes of the state in such case made and provided, and the railway, properties, franchises, rights, and privileges of the company were pur-

chased by the state for the sum of $1,000, it being the highest and best bidder at the sale. By this purchase the state became vested with all the railroad properties, and, no redemption being made, the company became wholly divested of its rights. In March, 1861, for the purpose of giving the company another opportunity to complete the roads contemplated, the state legislature by an act approved March 8, 1861, restored to the company all rights lost under the foreclosure upon the terms and conditions specified in the act, one of which was that if the company failed to construct a line of road between St. Paul and St. Anthony before January 1st, 1862, all rights under the act should be forfeited to the state without any further act or ceremony on its part. The company failed to comply with the conditions, and in consequence the land grant and all property, rights, privileges, and immunities of the company reverted to and became finally, fully, and absolutely vested in the state. Thereafter the state legislature by Chapter 20, Sp. Laws 1862, being an act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act incorporating that company, provided for the organization of the St. Paul and Pacific Railroad Company, and thereby granted to that company, and its successors, all rights, privileges, franchises, lands, and property theretofore granted to the Minnesota and Pacific Company and restored to the state by the foreclosure just referred to, and authorized it to construct the lines of road

undertaken by the old company. The terms and conditions relating to the construction of the road and the conveyance of lands as the work progressed were in all respects in conformity with the act of Congress. That company accepted the act and proceeded to the performance of the obligations thereby assumed. By Chapter 3, Sp. Laws 1864, the St. Paul and Pacific Company was authorized to issue one or more classes of preferred stock and to enter into agreements or contracts with the holders thereof for the administration of the portion of the road to which the stock might pertain, and for the independent organization by such holders to enable them separately or in conjunction with the general directors of the road to exercise supervision and control of their separate portion of the road. Under this act preferred stock was duly issued and the holders thereof, acting under the statute just referred to, organized and incorporated the First Division of the St. Paul and Pacific Railroad Company, which Company, through its officers, thereafter co-operated with the St. Paul and Pacific Company in the construction of the road. The act incorporating the latter named company contained no express reference to the rate or system of taxation to be imposed upon the company, but it is claimed that all the provisions on this subject contained in the old Minnesota and Pacific Company's charter passed by the terms of the act incorporating it and were included within the designation of "rights, privileges and immunities." However, by Chapter 6, Sp. Laws 1865, an act to

facilitate the completion of the St. Paul and Pacific Railroad and branches, the legislature imposed a different rate of taxation than that contained in the Minnesota and Pacific Company's charter, in this, that by this act the company was required to pay during the first three years, after thirty miles of its road had been completed, one per cent. of its gross earnings, two per cent. during the succeeding seven years, and thereafter three per cent. The act also contained a provision that the lands of the company should be subject to taxation as soon as sold, leased, or contracted to be sold or leased. The St. Paul and Pacific Company formally accepted this act, and the First Division Company thereafter complied with its terms and provisions by paying the rate of taxation thereby imposed. The organization of the First Division Company was legalized and confirmed by Chap. 1, Sp. Laws 1866. Between 1862 and 1871, both these companies separately executed trust deeds and mortgages covering the main line of the road and all its branches according to the ownership of the same by the separate companies, thereby conveying to the mortgagees or trustees all property, rights, privileges, franchises, and immunities held, owned, or possessed by either company. Both companies made default in the payment of the indebtedness secured by these instruments and they were duly foreclosed in the manner prescribed by law, John S. Barnes, for himself and associates, being the purchaser at the sale made under the foreclosure as to the branch line. Thereafter Barnes and his associates incorporated under the laws of

the state the St. Paul, Minneapolis, and Manitoba Railroad Company, and to this company they conveyed all rights acquired under the foreclosure stated. Thereafter the mortgage on the main line was foreclosed and the Manitoba Company became the purchaser. By these foreclosures the Manitoba Company became the sole owner of all rights, privileges, and property of the two other companies. The Manitoba Company leased its line, together with all property rights, franchises, privileges, and immunities to the defendant Great Northern Company, incorporated under the laws of the state for the term of 999 years. The old Pacific and the First Division Companies paid taxes to the state upon the basis of the act of 1865, already referred to, viz: one per cent. for the first three years after the completion of thirty miles of road, two per cent. for the succeeding seven years, and thereafter, and until their rights passed from them by the foreclosure proceedings just referred to, at the rate of three per cent. of their gross earnings. The Manitoba Company paid this rate at all times during its ownership and operation of the road. In 1871, there was duly incorporated into the Constitution of the state a provision to the effect that no statute theretofore enacted or thereafter to be enacted imposing a gross earnings tax upon the railroad companies should be repealed or amended except upon a submission of the proposition to a vote of the people. Sec. 32a, Article 4, State Constitution. Acting under this mandate, the legislature, by the statute made the basis of this action, amended the gross

earnings tax statutes theretofore enacted by raising the rate to four per cent. This applied to and made a uniform rate for all railroads of the state, (State v. Duluth & Northern Ry. Co., 102 Minn. 26) and was submitted to and ratified by the people, and thus became a valid enactment unless the contention of defendant presently to be mentioned be sustained.

This action was brought to recover the amount of the increased tax, the company having paid the old rate of three per cent. The defense to the action is that the charter provisions of the Minnesota and Pacific Railroad Company imposing upon it a three per cent. rate became upon acceptance by the company an irrepealable contract which passed unimpaired, as an appurtenant to the road and its franchises, by and through the various transfers of the rights and privileges of that company, to defendant, successor in interest of all prior companies. It is insisted that to enforce the statute in suit would impair the obligations of that contract and destroy and take from defendant a vested property right in violation of both the state and the federal constitutions. It appears from the record that several branches have in the past been constructed in connection with the main line of road, which were not expressly provided for by the original charter of the Minnesota and Pacific Company. As to these the trial court held the increase of the tax valid, but invalid as to the lines and branches contemplated by the original charter.

Judgment was ordered accordingly, and both parties appealed. We approach with some embar-

rassment the consideration of the questions presented owing to the expressions found in prior opinions in cases involving railroad taxation, which seem to and which defendant's counsel earnestly insist, fully determine the questions involved in the present case adversely to the contention of the state. But in view of the fact, which will be demonstrated further along in the opinion, that the question here presented, viz: whether the provisions of the Minnesota and Pacific Companys charter on the subject of the earnings tax constituted an irrevocable contract, was not involved in any prior litigation between the state and the railroad company, and what was said in the previous cases bearing upon the question was wholly unnecessary to the decision of the particular case, and therefore not of binding force or effect, we take up and dispose of the present case as though the question were, as it is, here for the first time. Whatever doubts the previous decisions may have created are all cleared up by a close analysis of the precise issues there presented.

1. The right of a state government through its legislature, when not restricted by constitutional provisions, by contract to limit its power of taxation is a doctrine too firmly established to admit of discussion at this time. It has been affirmed by the highest tribunal in the country, and though vigorously combatted by some able state courts, the question must be deemed for present purposes completely at rest. Oliver v. Ry. Co., 30 Ark. 128; Day v. Lawrence, 167 Mass. 371; Richmond v. Ry. Co., 21 Gratt. (Va.) 613; Wilmington Ry. Co. v. Reid, 13

Wall., 264; 12 Am. & Eng. Ency. Law, 272. The contract to be irrepealable, however, must clearly and conclusively appear. The power of taxation is a sovereign prerogative; its exercise is indispensable to the maintenance of the state and its institutions, and no inferences or presumptions arising from indefinite and uncertain language that it has relinquished, limited, or abandoned the right, as to any particular person or corporation, should be indulged by the court in support of an immunity not enjoyed by all tax payers alike. Therefore the contract is strictly to be construed and must be in language and terms too clear to admit of doubt. Chicago, etc. Ry. Co. v. Missouri *ex rel.* Guffy, 120 U. S. 569; State *ex rel* v. Stearns, 72 Minn. 200; County v. Bell, 43 Minn. 344. The rules governing the courts in construing contracts of this kind are tersely stated in a note to Adams v. Yazoo Ry. Co., 60 L. R. A., at page 38:

> "In construing and interpreting contracts of this class, the courts are guided by a set of principles that have now become fundamental. * * * These, in brief, are, chiefly, that taxation is the rule, and exemption the exception; the power of taxation is an essential attribute of sovereignty, necessary and vital to the very existence of the government; the whole community is interested in its maintenance unimpaired; it is presumed never to have been surrendered; and the intention to surrender it must be expressed in language so clear and free from ambiguity as to admit of no reasonable doubt. An exemption never arises by implication; it is always restricted to its lowest possible terms; every doubt must be resolved in favor of the government and against the claimant."

A long list of supporting authorities there cited discloses a uniform trend of judicial opinion on the subject.

Under the rule stated, it would seem at least doubtful whether the charter of the Minnesota and Pacific Railroad Company, in so far as pertinent to the subject of gross earnings taxation, constituted an irrepealable contract between the territory and the railroad company which forever bound the territory or future state, not only respecting the method of taxation, but also the rate thereof. Two distinct provisions on the subject of taxation were embodied therein, the first providing for a gross earnings tax in lieu of all other taxes and assessments, and second an exemption of the land granted until sold or contracted to be sold by the company. The charter provided on the subject of the earnings tax that in consideration of the grants, privileges, and franchises therein conferred by the territory, the railroad company should pay annually into the treasury of the territory or future state three per centum of its gross earnings, in lieu of all other taxes; "and in consideration of such annual payments, the said Company shall be forever exempt from all assessments and taxes whatever * * *. It is evident that a mere personal privilege was extended to the company which it might exercise or not at its option. If it failed to pay the earnings tax, the exemption ceased, and the territory could then resort to the usual method of compelling the company to contribute its share to the public burdens. The charter contains no express language

indicating an intention that the company should forever submit to this form of taxation, and if it was not so obligated then, under the rule requiring mutuality in contractual obligations, the territory was not bound by that system. In other words, a fair construction of the language of the charter within the strict rule, would seem to justify the conclusion that the parties intended the earnings system of taxation to continue so long as the company complied with the terms thereof by making the annual payments, and not as an irrevocable contract binding upon both parties for all time. That the right of modification was intended to be reserved to the territory is evidence by the subsequent legislation and conduct of defendant's predecessors. By Chapter 6, Sp. Laws 1865, the legislature modified the original charter by providing for the payment of one, two and three per cent., instead of a uniform rate of three per cent. This act was accepted by the St. Paul and Pacific Company, and acquiesced in by the First Division Company by a compliance with its provisions. By this modification defendant's predecessors received and retained the benefit of an average annual reduction in their taxes of about forty per cent. for the period of ten years. This amounted to a practical construction of the contract, so far as involving the right of the state to change the rate, and if the old companies were here contesting the validity of the present statute, increasing the rate, their denial of the power of the state to so act would come at least with little or no force. While their acquiescence in the prior

change would perhaps not be conclusive against them, it furnishes strong evidence that the old charter was not regarded at the time as irrepealable. Defendant, their successor, is in no better position. The right of modification is further evidenced by the amendment to the Constitution in 1871, by which it was provided that the system of gross earnings taxation as to railroad companies should not thereafter be changed except by a statute submitted to and approved by the electors.

We are of course not to be understood as intimating an opinion that a contract of the tenor and effect of the one claimed could not legally have been entered into by the territory, or that the conduct of the state in subsequently acting thereon and receiving from the railroad company payment of taxes under the method then adopted was so utterly void as to justify the company in reclaiming the money paid when in consideration of its payment it avoided the property tax, or justify the state in retaining the money and also imposing a property tax. So far as performed or executed by the parties, by the payment and acceptance of the tax, the contract was undoubtedly binding. 29 Am. & Eng. Law 828. But it is unthinkable that the territorial legislature intended forever, until "domesday and beyond," thus to preclude the state from applying to this company the same rule that the exigencies of the future might require it to adopt respecting the taxation of like companies in order to secure from them their equitable and ratable share of the necessary public revenues.

2. But, passing this question, upon which we merely express doubts, and conceding for present purposes that the charter provisions constituted an express contract between the territory and the Minnesota and Pacific Company, and that as to that company it was irrepealable, was it personal to the company, or did it become attached as an appurtenant to the charter, rights, franchises, and privileges of the company and pass down the line to defendant? We are of opinion that the question should be answered in the negative.

As a general rule, an exemption from taxation or the right to a particular form or method of taxation conferred by law upon a corporation is a personal privilege and inalienable by the grantee to another without express legislative authority. The law on the subject is clearly summed up in the case of Morgan v. La., 93 U. S. 217, where in the course of a discussion of the subject the court said:

> "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchise.' It is often used as a synonymous with rights, privileges and immunities though of a personal and temporary character; so that if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the Company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights and privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appro-

priate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the Company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the Company; the latter is personal and incapable of transfer without express statutory direction." See, also, authorities cited in 60 L. R. A. 1; and 35 Am. St. R. 390.

We have no statute in this state, nor did any exist in territorial days, authorizing, directly or indirectly, the mortgaging sale, or other transfer of an exemption of this sort. The charter of the Minnesota and Pacific Company contained no such provisions, nor any language which, by implication, would justify the conclusion that a sale, mortgaging, or other transfer of the privilege was authorized or even contemplated. The exemption does not pass as an appurtenant to railroad properties, and is not included within the expression "rights, privileges, and immunities." Gulf, etc., Ry. Co. v. Hewes, 183 U. S. 66; C. & O. Ry. Co. v. Miller, 114 U. S. 176; Lake v. Drummond, 49 S. E. 506; Rochester v. Ry. Co., 182 N. Y. 99; Covington Turnpike Co. v. Sandford, 164 U. S. 578. A distinction must not be overlooked when considering the assignability of a tax exemption between those imposing a commuted system in lieu of property taxes, and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular prop-

erty, and necessarily is personal and not assignable. But where, as in the case at bar, specific land is granted to a railroad company to aid in the construction of a railroad company is specifically exempted from taxation until sold by the company, and the company accepts in consideration of the exemption, the exemption attaches to and follows the land. New Jersey v. Wilson, 7 Cranch. (U. S.) 164; State v. Hicks, 30 Am. v. 423; Ry. Co. v. State, 75 Tex. 356. In such case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it.

It is an elementary rule of uniform application that rights or things in action which do not survive to an executor or administrator are not assignable. An exemption from taxation comes within the rule. And though such a right or immunity might be made assignable by the express terms of the grant creating it, the language of the grant under consideration does not, either expressly or impliedly, provide therefor. The exemption was by the terms of the charter extended to the Minnesota and Pacific Railroad Company, and not to it "and its successors and assigns." City of Rochester v. Ry. Co., 182 N. Y. 99. Nor is an exemption a property right, or in any proper view analogous to the grant of the right to construct and operate a railroad or to lay gas or water mains in a public street. Such franchises may be classified as property or property rights and are transferable without express authority from the granting power. Speaking

upon this subject the Court of Appeals of New York, in the case last cited, said:

> "We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions in restriction of the right of the state to tax the property or to regulate the affairs of the corporations do not pass to new corporations succeeding by consolidation or by purchase under foreclosure to the property and ordinary franchise of the first grantee. * * * This we have stated to be a statutory rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris*. That privilege is not at all similar to such franchises as the right to construct and operate a railroad, to lay gas mains and supply gas, and to maintain a ferry. These franchises, when granted, become property similar in their general attributes to other property. The grant for such a franchise, even without consideration, is, unless a right to revoke is reserved, as effectual to vest an indefeasible title in the grantee as a voluntary conveyance of a piece of land. Not so, however, as to an exemption from taxation or from the exercise of the police power. It is property only granted on a consideration, and if granted without consideration, may be recalled. Doubtless such exemptions, if attached to property itself, would increase its value; but because they are against common right they will be construed to be personal, and limited to the grantee, unless a contrary intention clearly appears."

See, also, Memphis Ry. Co. v. Commissioners, 112 U. S. 609; Gulf Ry. Co. v. Hewes, 183 U. S. 66; Memphis v. Ins. Co., 91 Tenn. 566; Home Ins. Co.

v. Tenn., 161 U. S. 198; Ry. Co. v. Comm., 97 Ky. 162; Ry. Co. v. Barry, 44 Ark. 17; an extended note in 35 Am. St. R. 390; 12 Am. & Eng. Ency. Law, 298, and cases cited.

3. But there is still another and stronger reason why an irrevocable contract right did not pass to the companies succeeding to the rights of the Minnesota Company. The contract, whatever may be its interpretation as between the territory and the original company, was entered into in 1857. Thereafter, in May, 1858, the territory was admitted to the union as a state. The foreclosure of the Minnesota and Pacific mortgage, from and through which the alleged immunity came, if at all, to defendant, occurred after the state was so admitted. Without stopping to consider the question whether there was a complete merger of the territorial exemption when the state became the purchaser and owner of the property, rights, and privileges of the company at the foreclosure sale, in so far as that exemption related to the earnings tax, treating it, as we must, independently of the land grant exemption, the further question whether the state could then grant a special privilege of this kind is answered in the negative by the positive terms of the Constitution on the subject of taxation. The Constitution then expressly provided, (Sec. 1, Article 9), that "all taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state." The following section specifically limited the right of

exemption and did not include exemptions of the character here involved nor authorize an earnings tax in lieu of all other taxes. This clearly precluded the state legislature from providing this form of taxation, by the revival of an old grant or otherwise, or from extending to any person or corporation an exemption from general taxation in consideration of the payment of an earnings tax. Nor could it create a corporation with the right to receive or hold a special privilege of this sort. This would seem too clear under the authorities to admit of serious argument. It is supported, not only on principle, but by courts of high standing. Trask v. McGuire, 85 U. S. 391. In that case the court in the course of the opinion said:

> "The act under which the sale was made provided that the purchasers of the road should have all the rights, franchises, privileges and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limitations and conditions therein contained, and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company originally possessed, if it were competent for the legislature at the time under the new Constitution, to confer this privilege. The question, therefore, is whether the legislature was competent to grant the immunity claimed under that Constitution, which went into operation on the 4th of July, 1865, previous to the passage of any of the Acts authorizing the proceedings under which the new company acquired its rights. * * * The inhibition of the Constitution applies in all its force against the renewal of an exemption equally as against its original creation; and this inhibition the legis-

lature could not disregard in providing for the sale of the property which it had purchased."

In Keokuk Ry. Co. v. Mo., 152 U. S. 301, the court in the following language reiterated the same doctrine:

> "But the decisive answer to this objection is that the Legislature had no power, in 1869, to extend to a new corporation created by the consolidation, an exemption contained in an act passed in 1857, before the constitution was adopted, and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

It was reaffirmed in Rochester Ry. Co. v. Rochester, 205 U. S. 236, and again in Yazoo Ry. Co. v. Vicksburg, 209 U. S. 358.

We are speaking now of the earnings system of taxation inaugurated by the Minnesota and Pacific charter, and not with reference to the specific exemption of the land grant. For, as already pointed out, the provisions of the charter on the subject of the earnings tax and those in reference to the land grant exemption are separate and independent. As to the latter, the exemption being as to specific prop-

erty delivered to the railroad company for a special purpose which would have been practically valueless without the exemption, (County of Nobles v. Ry. Co., 26 Minn. 294), and received by the company in consideration in part at least, of the exemption, was an exemption of the land and not of the corporation. It follows, therefore, that an irrevocable right to the gross earnings system of taxation at an unchangeable rate did not pass from the state when it conferred upon the immediate successors of the original company all "the property, rights, privileges, franchises and immunities" of that company, which it acquired on the foreclosure. Nor was one created by the acts of the state legislature in 1865, by which the original charter provisions on the subject were modified. Chaps. 6 and 9, Sp. Laws 1865. The legislature of the state was prohibited by the express mandate of the Constitution, from granting such an immunity. All statutes therefore by which an attempt was made to confer the immunity upon defendant's predecessors in interest were unconstitutional and void. State *ex rel.* v. Stearns, 72 Minn. 200.

4. There is, however, another feature of the controversy which fully sustains the right of the state to increase the gross earnings tax. About the year 1869 an agitation was commenced on the subject of railroad taxation which has since then almost continuously, in one form or another, been either before the legislature or the courts of the state. This did not, until the act under consideration was passed, involve the gross earnings system or the

rate thereof, but was directed to efforts to separate the land grant of this and other land grant roads for the purposes of taxation in addition to the earnings tax. This we held in the Parcher case, *supra*, and other subsequent cases, could not be done. But the earlier agitation led to the amendment of the Constitution in 1871, by which Sec. 32a of Article 4 was added to that instrument. That amendment, as held in the Stearns case, *supra*, in effect validated prior legislation inaugurating this form of taxation as to railroad companies, and all acts conferring the privilege to so discharge their obligations in respect to taxation. But coupled therewith was the reserved right on the part of the state to repeal or amend the same, provided the proposed amendment be ratified by the electors. Upon that amendment to the Constitution then, the validity of which has never been challenged, rests the inauguration of a valid earnings system of railroad taxation in this state; but no irrevocable contract right was thereby granted or became vested in the railroad companies. The power to amend, within reasonable limitations, still remained in the state, under which the act under consideration is valid. It simply increased the rate from three to four per cent., and no claim is made that, if the power of amendment exists, as compared with the rate imposed upon other taxpayers, it is unreasonable or unfair to the railroad companies. This power of amendment was expressly recognized and affirmed by the Supreme Court of the United States on a review of the case of State *ex rel* v. Stearns, *supra*. (Stearns v. State,

179 U. S. 223.) Mr. Justice Brewer, speaking for the court with reference to this amendment to our Constitution, said:

> "Confessedly after that amendment there existed a binding contract between the state and the railroad companies, by which the taxes on all their property were to be commuted and discharged on the payment of three per cent. of the gross earnings. If nothing had since occurred, that contract, under the decision of the Supreme Court, would continue exempting lands not used, as well as lands used for railroad purposes, from any other taxation than that which was expressed by three per cent. on the gross earnings of the companies. In other words, so far as the railroad companies are concerned, that constitutional amendment did away with the restrictive features of Sections 1 and 3 of Article 9 in the state constitution, and permitted and endorsed a peculiar method of taxation of railroad companies. The constitutional amendment of 1871 forbade any change by repeal or amendment of laws respecting the taxation of railroad companies except upon a vote of the people. The converse of that proposition may be accepted, to-wit: that by a vote of the people the tax provision concerning railroads might be repealed or amended. But is there no limitation upon the power of amendment?"

The court then proceeded to hold that an amendment which attempted to separate the land grant for the purposes of ordinary taxation, still retaining and enforcing the earnings rate in full, was unreasonable, saying that

> "a contractual exemption of the property of the railroad company in whole, upon consideration of a certain payment, cannot be changed by the state so as to continue the obligation in

full, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract."

The argument of counsel for defendant that the purpose and object of this amendment to the Constitution was to prevent any decrease in the rate or any change in the method without the consent of the people is not sound. Nor is there anything in the opinion in State v. Luther, 56 Minn. 156, to sustain that view. On the contrary, the court by the supplemental opinion refrained from expressing any opinion upon the question whether the power of amendment remained in the state.

If our views upon this branch of the case are sound, and of their correctness we are firmly convinced, it follows that the statute increasing the earnings tax to four per cent. is valid as to all lines owned and operated by defendant, whether authorized or contemplated by the old Minnesota and Pacific charter, or by subsequent legislation. We so hold.

5. But it is urged that the conclusions here announced are in conflict with prior adjudications of this court, upon which reliance is had to sustain the claim that an irrevocable contract for a three per cent. rate was created by the Minnesota and Pacific charter which passed to and became vested in defendant. Attention is called in support of this contention to Ry. Co. v. Parcher, 14 Minn. 297; State v. Ry. Co., 32 Minn. 294; County of Stevens v. Ry. Co., 36 Minn. 467; County of Traverse v. Ry. Co., 73 Minn. 417; State v. Luther, 56 Minn. 156;

Ry. Co. v. Pfaender, 23 Minn. 217; State v. Ry. Co., 30 Minn. 311; County of Todd v. Ry. Co., 38 Minn. 163, and other similar cases. But an examination of each demonstrates that the question here presented was in no way involved. The Parcher case involved the right of the state to tax the land grant in addition to enforcing the earnings tax, and while the court discussed at some length the contractual relations arising from the Minnesota and Pacific charter, it finally reached the pivotal question before it and held that the specific exemption of the land was valid, and upon that conclusion based its decision. The result of that decision is in full harmony with the view that the exemption of specific property donated to the railroad company for a specific purpose attached to the land, and was not, like the earnings system, a personal privilege to the grantee. The Pfaender case involved solely the question whether the railroad was liable for a two or a three per cent. tax on its earnings. The case of State v. Ry. Co., 21 Minn. 315, again presented the taxability of the land grant, and the decision was placed squarely upon the clause of the charter of May 22, 1857, which is therein quoted, that the lands granted by the state "shall be and are exempted from all taxation until the same shall have been sold and conveyed." The other cases also involved solely this specific exemption. The question whether the provisions of the charter respecting the gross earnings tax constituted an irrevocable contract was not before the court in either of the older cases and a consideration thereof was wholly un-

necessary to the result reached. Such appears to have been the view of Mr. Justice White, (with whom concurred Justices Harlan, Gray and McKenna), in Stearns v. State, 179 U. S., supra, for he there said:

> "Nor does it seem to me that the decisions of the Minnesota courts, which are referred to as showing that under the Constitution of that state it was competent for the legislature to enact a gross receipt tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. In no single one of these cases was the question of irrepealable contract presented, considered, or decided in any form."

What was said in the opinion in State v. Ry. Co., 21 Minn. 315, in reference to the case of Trask v. McGuire, *supra*, should be given no greater force or effect than the decision of a question now claimed to have been determined but which was not before the court. The taxation of the land grant was also involved in County of Nobles v. Ry. Co., 26 Minn. 294; County of Stevens v. Ry. Co., 36 Minn. 467; County of Todd v. Ry. Co., 38 Minn. 163; and in Traverse County v. Ry. Co., 73 Minn. 417. In the last case cited the court again took occasion to say, and correctly so, that "the question whether the legislation on the subject involves the elements of a contract between the defendant or its predecessors and the state, is not necessarily involved, and need not now be considered."

Yet that case, and the Luther case *were* where substantially the same statement was made, were for all practical purposes identical with the other

cases referred to where the question received elaborate attention. State v. Ry. Co., 30 Minn. 311; State v. Ry. Co., 32 Minn. 294, involved only the construction of the phrase "gross earnings," and what earnings came within its meaning. Prior to the statute construed in State *ex rel* v. Stearns, *supra*, no attempt had been made by the legislature to amend or modify this system of taxation, and the act involved in the case at bar was the first attempt to increase the rate. In that case, as already pointed out, there was a legislative attempt, based on the constitutional amendment of 1871, separately to tax the lands of the company in addition to the gross earnings tax. This the Supreme Court of the United States held unreasonable.

In view of this situation it cannot be urged with any force that the earlier decisions of the court rightly adjudicated or determined the question of the power of the state to change the rate. The question not being involved in the prior cases, former expressions of the court were *obiter* and of no binding force or effect as final adjudications. What was said therein is confessedly at variance with the conclusions of nearly all other courts, state and federal, and inasmuch as the precise question was not necessarily there before the court, we are fully justified in declining to treat them as final.

Much has been written and said on the subject of the rule of *stare decisis* and of the importance, in the interests of certainty in the law, of following and applying previous decisions in cases involving the same facts. The rule which requires this is a

wholesome one and would not minimize it in the least in the present case. It has its limitations, however, and applies only in those cases where the facts and issues presented are for practical purposes the same. It does not apply to expressions of opinion upon, or even decisions of, questions not necessary to the ascertainment of the rights of the parties in the pending litigation. When the court goes beyond the precise issues and expresses views or opinions upon questions not necessarily before it, the views so expressed will be respected, but cannot arbitrarily control a subsequent case where the very point is squarely presented. The reason is obvious. A question actually before the court is investigated in all its phases with deliberation and care, and though other questions may be discussed and apt principles of law declared by way of illustration, their possible bearing on future cases is seldom fully considered. 26 Am. & Eng. Ency. Law, 168, and cases cited; Cohens v. Virginia, 6 Wheat. 339. And in the case at bar, the validity of the land grant exemption was alone presented in nearly all the previous cases upon which defendant relies. While the court there considered and discussed the gross earnings provisions of the charter, a situation like that now before us was not investigated, considered or attempted to be determined. The language of Chancellor Kent, page 477 of his Commentaries, is appropriate and apt in connection with this feature of the case:

> "But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I

recollect that there are more than one thousand cases to be pointed out in the English and American books of report which have been overruled, doubted, or limited in their application. It is probable that the record of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere quetsion of expediency depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it."

The Supreme Court of Mississippi in Adams v. Yazoo Ry. Co., 77 Miss. 194, a case involving a situation quite analogous to the case at bar, and where the court was confronted with prior decisions in conflict with the conclusion reached in the case then before it, said:

"We have all proper respect for the doctrine of *stare decisis*, but it is a doctrine not inflexible, and departed from over and over by the wisest courts in proper cases. If the doctrine of *stare decisis* can be disregarded in proper cases, where the question is one merely of property rights between individuals, how much stronger is the reason for disregarding it when so to do results, as here, in restoring to a sovereign state the right to tax corporations and make them bear their just share of the burdens of that government whose protection they so constantly and persistently invoke."

See also, 26 Am. & Eng. Ency. Law, 163; Boyd v. Alabama, 94 U. S. 59; Cromwell v. County, 94 U.

S. 351; Bradshaw v. Mill Co., 52 Minn. 59; High v. Shoemaker, 22 Cal. 302; Cohens v. Virginia, 6 Wheat. 399.

Our conclusions therefore are that defendant has no irrepealable contract on the subject of its taxation, that the statute increasing the rate of the gross earnings tax to four per cent. thus making a uniform rate as to all railroads of the state, impairs none of its contractual or other vested rights, that it is valid, and the state is entitled to judgment accordingly. The judgment of the trial court is therefore reversed on the state's appeal, affirmed as to defendant's appeal, and final judgment ordered to be entered in this court in favor of the state for the amount claimed in the complaint.

BROWN, J.

Trans. p. 345 et seq.

GREAT NORTHERN RAILWAY COMPANY *v.* STATE OF MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 359. Argued November 5, 8, 1909.—Decided February 21, 1910.

A state legislature, unless restrained by the constitution of the State, may contract to limit the State's power of taxation; but, as taxation is essential to the existence and operation of government, an exemption therefrom will not be presumed from doubtful language, but must be expressed beyond reasonable doubt.

When a State becomes the owner by purchase of the entire property and franchises of a corporation created by itself, it can only convey the same pursuant to the provisions of the then existing constitution and it cannot reinvest either a purchaser or the original owner with any exemption from taxation prohibited by the existing constitution.

---

setts, 268; *Perkins* v. *Boothby*, 71 Maine, 94, 97; *Bank of Lakin* v. *National Bank*, 57 Kansas, 183.

Where the constitution of the State requires equal and uniform taxation of all real and personal property in the State upon a cash basis and specifies the property that can be exempted, the legislature cannot thereafter agree that the payment of a given per cent. of the earnings of a corporation from property of a class not included among the properties that can be exempted shall be in lieu of all other taxation; and such a contract, if attempted to be made, would not be protected by the impairment of obligation clause of the Constitution of the United States.

There is a difference between a contract for a commuted system of taxation on earnings of a railroad corporation and a specific exemption from taxation of lands granted to the corporation, for a defined period; the former is personal and not assignable while the latter is attached to and follows the land.

In this case this court accepts the view of the state court as to the scope of its own decisions.

106 Minnesota, 303, affirmed.

THE facts are stated in the opinion.

Mr. William R. Begg for plaintiff in error:

The decision of the Supreme Court of Minnesota in this cause is not controlling upon the questions presented by the assignments of error.

Where the claim is that a contract is impaired by a state law this court determines for itself the existence and scope of the contract and whether it is impaired by the law as construed by the highest court of the State. *Bank* v. *Skelly*, 1 Black, 436, 443; *Insurance Co.* v. *Debolt*, 16 How. 415, 451; *Wright* v. *Nagle*, 101 U. S. 791, 793; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Railroad Co.* v. *Palmes*, 109 U. S. 244, 256; *Gas Co.* v. *Gas Light Co.*, 115 U. S. 683, 692; *Railroad Co.* v. *Dennis*, 116 U. S. 665, 667; *Railroad Co.* v. *Alsbrook*, 146 U. S. 279, 293; *Bryan* v. *Board*, 151 U. S. 639, 650; *Railroad Co.* v. *Tennessee*, 153 U. S. 486, 492; *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Stearns* v. *Minnesota*, 179 U. S. 223, 233; *Muhlker* v. *Railway Co.*, 197 U. S. 544, 570; *Powers* v. *Railway Co.*, 201 U. S. 543, 546.

But the law as it has been declared by the state court at the date when the contract was made, enters into and becomes a part of the contract. *Bronson* v. *Kinzie*, 1 How. 311, 315; *McCracken* v. *Hayward*, 2 How. 608, 612; *Gelpcke* v. *Dubuque*, 1 Wall. 175, 177; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Edwards* v. *Kearzey*, 96 U. S. 595, 601; *Douglas* v. *Pike County*, 101 U. S. 677; *Railroad Co.* v. *Hamblen County*, 102 U. S. 273, 277; *Wilson* v. *Gaines*, 103 U. S. 417, 422; *Taylor* v. *Ypsilanti*, 105 U. S. 60, 71; *Green County* v. *Conness*, 109 U. S. 104, 105; *Bank* v. *Franklin County*, 128 U. S. 526; *Los Angeles* v. *Water Co.*, 177 U. S. 558; *Bradley* v. *Lightcap*, 195 U. S. 1, 20.

The settled rules of property existing at the time a contract is made are just as much a part of that contract as are the covenants of the parties; and the law which has thus entered into the contract cannot be abrogated or changed by subsequent decisions so as to save legislation enacted after the date of the contract. Cases *supra* and *Hardin* v. *Jordan*, 140 U. S. 371, 380.

Where the Supreme Court of a State has sustained the validity of a statute from which a contract arises, this court accepts that decision. *Powers* v. *Railway Co.*, 201 U. S. 543, 556.

The act of May 22, 1857, and the acceptance thereof by the Minnesota Company created a valid and irrepealable contract relating to the taxation of the railroads authorized by the act. *Home* v. *Rouse*, 8 Wall. 430, 438; *Railroad Co.* v. *Reid*, 13 Wall. 264; *Humphrey* v. *Pegues*, 16 Wall. 244, 249; *Delaware Railroad Tax Case*, 18 Wall. 206, 225; *Railroad Co.* v. *McGuire*, 20 Wall. 36, 43; *Railroad Co.* v. *Decatur*, 147 U. S. 190, 201; *Railroad Co.* v. *Tennessee*, 153 U. S. 486; *Powers* v. *Railway Co.*, 201 U. S. 543; *First Div. Co.* v. *Parcher*, 14 Minnesota, 297; *Railway Co.* v. *Pfaender*, 23 Minnesota, 217, 223; *St. Paul* v. *St. Paul & S. C. R. Co.*, 23 Minnesota, 469, 474; *Stevens County* v. *Manitoba Co.*, 36 Minnesota, 467, 471; *State* v. *Stearns*, 72 Minnesota, 200, 223; *Traverse County* v. *Manitoba Co.*, 73 Minnesota, 417, 426.

There were no constitutional restrictions upon the power

of the Territory to create corporations by special act and to make valid contracts with respect to taxation. Cases *supra*, and *People* v. *Marshall*, 6 Illinois, 672.

The act in question was passed by the legislative assembly of the Territory and accepted by the Minnesota Company prior to the admission of the State into the Union.

The benefit to accrue to the public from the enterprise contemplated by the charter is a sufficient consideration for the contract. Cases *supra*, and *Tomlinson* v. *Jessup*, 15 Wall. 454, 459; *Railroad Co.* v. *Decatur*, 147 U. S. 190, 201.

The contract created by the act of May 22, 1857, is an entire and inseparable contract covering the taxation of both the railroads and the granted lands. *New Jersey* v. *Yard*, 95 U. S. 104, 116; *Stevens County* v. *Manitoba Co.*, 36 Minnesota, 467; *Traverse County* v. *Manitoba Co.*, 73 Minnesota, 417, 423; Ch. 253, Laws, 1901; *Railway Co.* v. *Pfaender*, 23 Minnesota, 217; *State* v. *Manitoba Co.*, 30 Minnesota, 311; *State* v. *Northern Pac. Ry. Co.*, 32 Minnesota, 294; *State* v. *Northern Pac. Ry. Co.*, 36 Minnesota, 207; *State* v. *Luther*, 56 Minnesota, 156; *Todd County* v. *Manitoba Co.*, 38 Minnesota, 534.

The State cannot take the benefits of the contract without making compensation therefor. *Bridge Co.* v. *Dix*, 6 How. 507, 534; *Gas Light Co.* v. *Light Co.*, 115 U. S. 650; *Stearns* v. *Minnesota*, 179 U. S. 256, distinguished.

The legislature of the State had power under the constitution to make a valid and irrepealable contract modifying the provisions as to taxation of the act of May 22, 1857. Cases *supra*.

The vicissitudes through which these four original land-grant companies passed are stated in *Huff* v. *Winona & St. Peter Co.*, 11 Minnesota, 181; *Fitz* v. *Minnesota Central Co.*, 11 Minnesota, 414; *First Div. Co.* v. *Parcher*, 14 Minnesota, 297; *State* v. *Winona & St. Peter Co.*, 21 Minnesota, 315; *St. Paul* v. *St. Paul & Sioux City Co.*, 23 Minnesota, 469, 472.

It was within the power of the State, acting as trustee of the land-grant, to make such contract with reference to the tax-

ation of the roads for whose benefit the grant was made as in its opinion would best accomplish the objects of the trust.

The contract does not create an exemption from taxation but provides a commuted or substituted form of taxation. It is a tax against property, not against the person. *Stearns* v. *Minnesota*, 179 U. S. 223; *St. Paul* v. *St. Paul S. C. R. Co.*, 23 Minnesota, 469, 471; *State* v. *Nor. Pac. Co.*, 32 Minnesota, 294, 295; *Hennepin County* v. *Manitoba Co.*, 33 Minnesota, 534, 535; *County of Ramsey* v. *Railway Co.*, 33 Minnesota, 537; *County of Todd* v. *Manitoba Co.*, 38 Minnesota, 163; *St. Paul* v. *Manitoba Co.*, 39 Minnesota, 112, 113; *State* v. *Luther*, 56 Minnesota, 156, 160; *Traverse County* v. *Manitoba Co.*, 73 Minnesota, 417, 425; *State* v. *Koerner*, 85 Minnesota, 149, 150; *State* v. *Telephone Co.*, 120 N. W. Rep. 534, 538.

The contract was not personal to the Minnesota Company, but with the railroads and the other franchises, powers, privileges and immunities granted by the charter, was transferable to the successors of that company. Cases *supra*, and *First Div. Co.* v. *Parcher*, 14 Minnesota, 297; *County of Nobles* v. *Railroad Co.*, 26 Minnesota, 294, 298; *County of Ramsey* v. *Railway Co.*, 33 Minnesota, 537; *Board* v. *Railroad Co.*, 49 N. J. Law, 193; *S. C.*, 7 Atl. Rep. 826, 838.

The State of Minnesota, the St. Paul Company, the First Division Company and the Manitoba Company successively acquired by transfer all the franchises and immunities, including the franchise to be a corporation, granted to the Minnesota Company by the act of May 22, 1857.

The contract as to taxation is a right which passed by transfer under the description "property, franchises, rights and privileges." Cases *supra*, and *Railroad Co.* v. *Maryland*, 10 How. 376, 394; *Tomlinson* v. *Branch*, 15 Wall. 460; *Humphrey* v. *Pegues*, 16 Wall. 244, 247; *The Delaware Railroad Tax Case*, 18 Wall. 206; *Railroad Co.* v. *Georgia*, 92 U. S. 695; *Railroad Co.* v. *Virginia*, 94 U. S. 718; *Green County* v. *Conness*, 109 U. S. 104; *Railroad Co.* v. *Wright*, 116 U. S. 231; *Tennessee* v. *Whitworth*, 117 U. S. 139, 146; *Given* v. *Wright*, 117 U. S. 648.

Neither the transferability of the contract as to taxation nor the capacity of the St. Paul Company, the First Division Company, the Manitoba Company and the plaintiff in error to acquire the contract has been destroyed by the constitution of the State of Minnesota.

Such was the settled rule of law in Minnesota until the decision in the present case. The rule was an established rule of property.

A valid contract cannot be affected any more by constitutional amendment than by act of legislature. *Gunn* v. *Barry*, 15 Wall. 610, 623; *State* v. *Young*, 29 Minnesota, 474, 550; *Dartmouth College Case*, 4 Wheat. 518, 652; *Planter's Bank* v. *Sharp*, 6 How. 301, 321; *Walker* v. *Whitehead*, 16 Wall. 314; *Railway Co.* v. *Texas*, 170 U. S. 243, 256.

Constitutional provisions do not enter into the merger or prevent the acquisition by the absorbing company of the franchises and immunities of the merged companies. *State* v. *Railroad Co.*, 45 Maryland, 361; *Tomlinson* v. *Branch*, 15 Wall. 460; *Charleston* v. *Branch*, 15 Wall. 470; *Branch* v. *Charleston*, 92 U. S. 677; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Railroad Co.* v. *Maine*, 96 U. S. 499; *Shields* v. *Ohio*, 95 U. S. 319; *Railroad Co.* v. *Palmes*, 109 U. S. 244; see also *Railroad Co.* v. *Commissioners*, 112 U. S. 609; *Railroad Co.* v. *Berry*, 113 U. S. 465; *Railroad Co.* v. *Miller*, 114 U. S. 176; *Railroad Co.* v. *Missouri*, 152 U. S. 301; *Bank* v. *Tennessee*, 161 U. S. 186; *Railroad Co.* v. *Adams*, 180 U. S. 1; *Railroad Co.* v. *Hewes*, 183 U. S. 66; *Railroad Co.* v. *Maryland*, 187 U. S. 258; *Traction Co.* v. *Algelt*, 200 U. S. 304; *Railway Co.* v. *Rochester*, 205 U. S. 236; *Railroad Co.* v. *Vicksburg*, 209 U. S. 358.

Mr. George T. Simpson, Attorney General of the State of Minnesota, and *Mr. George W. Peterson*, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This suit by the State of Minnesota against the Great North-

ern Railway Company, a corporation organized and existing under the laws of that State, has for its object to recover the balance alleged to be due the State on account of taxes from the railway company, under a statute known as Chapter 253 of the General Laws of Minnesota of 1903.

The controlling question in the case relates to the constitutionality of certain sections of that statute, as follows: "§ 1. Every railroad company owning or operating any line of railway situated within or partly within this State shall, during the year 1905, and annually thereafter, pay into the treasury of this State in lieu of all taxes and assessments upon all property within this State owned and operated for railway purposes by such company, including the equipment, appurtenances, appendages and franchises thereof, a sum of money equal to *four* per cent of the *gross earnings* derived from the operation of such line of railway within this State; and the annual payment of such sum shall be in full *and in lieu of all other taxes and assessments upon the property and franchises so taxed.* The lands acquired by public grants shall be and remain exempt from taxation until sold or contracted to be sold or conveyed, as provided in the respective acts whereby such grants were made or recognized. § 2. The term 'gross earnings derived from the operation of such line of railway within this State' as used in section one of this act is hereby declared and shall be construed to mean all earnings on business beginning and ending within the State and a proportion based upon the proportion of the mileage within the State to the entire mileage over which such business is done of earnings on all interstate business passing through, into or out of the State." Gen. Laws, Minn., 1903, c. 253, p. 375.

The effect of the statute, Minnesota asserts, was to place the Great Northern Railway Company, as to rates, on the same basis of taxation as other railroads in the State. But, the company contended in the courts below, and contends here, that the requirement to pay for 1905 and annually thereafter *four* per cent of the gross earnings derived from the operation

of its railroad within the State was in violation of a statute enacted May 22d, 1857, by the Territory of Minnesota, incorporating the Minnesota and Pacific Railroad Company, and which fixed *three* per centum of the gross earnings of that company's railroad property as a tax in lieu of all taxes and assessments whatever. Sess. Laws, Minn., 1857, Extra Sess., §§ 1, 4, 18. The provisions in the latter statute, it is alleged, constituted a contract with that company, (the remote predecessor of the defendant company), which was protected, in favor of the latter, by the contract clause of the Constitution of the United States, as well as by the clause of the Fourteenth Amendment forbidding the deprivation of property without due process of law. All this was disputed by the State.

The gross earnings of the company during 1905 were, it is conceded, $18,540,396.27, four per cent of which, $741,615.85, the State demanded under the act of 1903. The company paid $620,878.47 on account of gross earnings for 1905, and refused to pay more. For the difference, $120,737.38, with interest, the State claimed judgment. The railway company admitted its liability to pay four per cent on the gross earnings derived from certain lines operated by it in 1905, but denied liability in excess of three per cent on the gross earnings derived, during the same period, from certain other lines. It insisted that the sum paid by it before being sued herein was all that could be legally demanded by the State for the year 1905.

The trial court made certain findings of fact and announced certain conclusions of law that were not satisfactory to either party. But it was stipulated that, on the basis of those findings and conclusions, the State would be entitled to a judgment for $32,285.94, with interest from July 11th, 1898, and costs; and for that sum judgment was given by the trial court against the railway company. Each party prosecuted an appeal to the Supreme Court of Minnesota. That court sustained the State's appeal and reversed the judgment with directions to enter judgment in favor of the State for the entire amount it had

sued for—$120,737.88, with interest. 106 Minnesota, 303. Hence this writ of error by the railway company.

It is necessary to a clear understanding of the question of contract, as well as the objections raised against the act of 1903, that we state certain facts in the history of the taxation of railroad property in Minnesota.

By an act approved February 26th, 1857, Congress authorized the people of the Territory of Minnesota to form a constitution preparatory to its admission into the Union as a State on an equal footing with the original States. 11 Stat. 166, c. 60. And by an act passed March 3d, 1857, it made a grant of lands to the Territory to aid in the construction of railroads between certain points with branches between certain other points, and provided that the lands so granted should be subject to the future disposal by the Legislature of the Territory or future State for the purposes expressed by Congress, and no other. 11 Stat. 195, 196, c. 99, §§ 1, 3.

In execution of the trust created by that act of Congress, the Legislative Assembly of the Territory, by the above act of May 22d, 1857, incorporated the Minnesota and Pacific Railroad Company, investing it with all the powers, privileges, franchises and immunities incident to a corporation, and empowering it to survey, locate, construct, maintain and operate a railroad with one or more tracks or lines between certain named places; to which end it was authorized to enter upon and appropriate lands belonging to the Territory or future State, not exceeding a prescribed width throughout the entire length of its railroad. Sess. Laws Minn., 1857 Extra Sess., p. 1, §§ 1, 4, 18.

The 18th section of the latter act constitutes an important feature in this case. So much of that section as is material in determining this case is as follows: "*In consideration of the grants, privileges and franchises* herein conferred on the said Minnesota and Pacific Railroad Company, the said company shall and will, on or before the first day of March in each year,

pay into the treasury of the Territory or future State, *three* per centum of the *gross earnings* of the said railroad, for the year ending on the last day of the preceding December, *in lieu of all taxes and assessment whatever*, . . . and for securing to the Territory or State the payment of the aforesaid per centum it is hereby declared that the State shall have a lien upon the railroads of the said company, and upon all other property, estate and effects of the said company, whether real, personal or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company. The first payment shall be made on the first day of March next after fifty miles of said railroad shall be completed, and such payment shall be in lieu of all taxes and in full of all claims of the Territory or State for the grant hereby made, *and in consideration of such annual payments* the said company shall be *forever exempt from all assessments and taxes* whatever by the Territory or State which shall succeed the Territory, or by any county, city, town, village or other municipal authority in the Territory or State upon all stock in the said 'Minnesota and Pacific Railroad Company,' whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal, or mixed, held by said company, and said *land* granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company shall be *exempt from all taxation till sold and conveyed by said company.*" This act, it must be remembered, was passed before Minnesota became a State.

By an act approved May 11th, 1858, Minnesota was admitted into the Union as a State, with the constitution it had adopted by popular vote on the thirteenth of October previous, 11 Stat. 285, c. 31; which constitution provided that all taxes to be raised in the State "shall be as *nearly equal as may be*, and *all* property on which taxes are to be levied shall have *a cash valuation* and *be equalized and uniform throughout the State.*" Another section in the same article required that

"laws shall be passed taxing all moneys, credits, investments in bonds, stock, joint stock companies or otherwise, and also *all* real and personal property, *according to its true value in money;*" also, that certain specified kinds of property, devoted to charitable and public uses, "shall, by general laws, be exempt from taxation." Art. 9, §§ 1, 3. But *railroad property was not included in such exemptions;* therefore, after the state constitution went into operation, railroad property—if no inviolable contract controlled the matter—was taxable in Minnesota only on the basis fixed in that instrument.

On the twenty-third of June, 1860, there was a foreclosure of two mortgages, (the principal one having been executed July 31st, 1858, and a supplementary one executed November 27th, 1856), which the Minnesota and Pacific Railroad Company, under the authority of an act of the legislature, had given to secure moneys borrowed by it as well as certain bonds it had issued. Those mortgages covered the company's line and all its property and franchises. Their validity is not questioned in this case. The State, being the highest and best bidder at the foreclosure sale, became the purchaser on the twenty-third of June, 1860, and by that purchase, the Supreme Court of Minnesota has said, "the State became vested with all the railroad properties, and, no redemption being made, the company became wholly divested of its rights."

Subsequently, on March 8th, 1861, the Legislature passed an act entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad," which provided "that the road, lands, property, rights, franchises, privileges and immunities belonging or pertaining to the Minnesota and Pacific Railroad Company, prior to the sale and purchase thereof by the Governor on the 23d day of June, 1860, on behalf of the State, and now claimed or held by the State, and all bonds and securities of the said company held by the State, shall be and are hereby released, discharged and restored to the said company free of all liens or claims thereon held by or

in behalf of the State." Section 1. The act named certain conditions to be performed by the company in respect of the proposed railroad, and if they were not performed by the time specified, then all the rights and benefits conferred upon said company "shall be forfeited to the State absolutely without any further act or ceremony whatever." Laws, Minn., 1861, c. 5, p. 235. The company having failed wholly to comply with the conditions prescribed, all the rights, privileges, franchises and immunities granted to it by the last named act were resumed by and reinvested in the State.

Thereafter, by an act of March 10th, 1862, the Legislature, with a view of facilitating the construction of the Minnesota and Pacific Railroad and of amending and continuing the act of incorporation relating thereto, granted to certain named parties under the corporate name of the St. Paul and Pacific Railroad Company "all the rights, privileges, property, franchises, property and interests" granted by the Territory of Minnesota to the Minnesota and Pacific Railroad Company by the above act of May 22d, 1857, "with all the immunities, rights, property, benefits and privileges which the said Minnesota and Pacific Railroad Company had, or might, or could have by reason of the passage of said act, free and clear of all liens thereon, and free from all liens and claims of the State of Minnesota against the same, except such as are retained by the provisions of this act." Special Laws, Minn., 1862, c. 20.

We take from the opinion of the Supreme Court of the State this additional statement of facts, 106 Minnesota, 303, 319: "By Chapter 3, p. 174, Sp. Laws 1864, the St. Paul and Pacific Company was authorized to issue one or more classes of preferred stock and to enter into agreements or contracts with the holders thereof for the administration of the portion of the road to which the stock might pertain, and for the independent organization by such holders to enable them separately or in conjunction with the general directors of the road to exercise supervision and control of their separate portion of the road. Under this act preferred stock was duly issued and

the holders thereof, acting under the statute just referred to, organized and incorporated the First Division of the St. Paul and Pacific Railroad Company, which company, through its officers, thereafter coöperated with the St. Paul and Pacific Company in the construction of the road. The act incorporating the latter named company contained no express reference to the rate or system of taxation to be imposed upon the company, but it is claimed that all the provisions on this subject contained in the old Minnesota and Pacific Company's charter passed by the terms of the act incorporating it and were included within the designation of 'rights, privileges, and immunities.' However, by Chapter 6, p. 40, Sp. Laws 1865, an act to facilitate the completion of the St. Paul and Pacific Railroad and branches, [March 2d, 1865], the Legislature imposed a different rate of taxation than that contained in the Minnesota and Pacific Company's charter, in this, that by this act the company was required to pay during the first three years, after thirty miles of its road had been completed, one per cent of its gross earnings, two per cent during the succeeding seven years, and thereafter three per cent. The act also contained a provision that the lands of the company should be subject to taxation as soon as sold, leased, or contracted to be sold or leased. The St. Paul and Pacific Company formally accepted this act, and the First Division Company thereafter complied with its terms and provisions by paying the rate of taxation thereby imposed. The organization of the First Division Company was legalized and confirmed by Chap. 1, p. 11, Sp. Laws 1866.

"Between 1862 and 1871, both these companies separately executed trust deeds and mortgages covering the main line of the road and all its branches according to the ownership of the same by the separate companies, thereby conveying to the mortgagees or trustees all property, rights, privileges, franchises, and immunities held, owned, or possessed by either company. Both companies made default in the payment of the indebtedness secured by these instruments and they were duly

foreclosed in the manner prescribed by law, John S. Barnes, for himself and associates, being the purchaser at the sale made under the foreclosure as to the branch line. Thereafter Barnes and his associates incorporated under the laws of the State the St. Paul, Minneapolis and Manitoba Railroad Company, and to this company they conveyed all rights acquired under the foreclosure stated. Thereafter the mortgage on the main line was foreclosed and the Manitoba Company became the purchaser. By these foreclosures the Manitoba Company became the sole owner of all rights, privileges, and property of the two other companies. The Manitoba Company leased its line, together with all property rights, franchises, privileges, and immunities to the defendant Great Northern Company, incorporated under the laws of the State for the term of 999 years. The old Pacific and the First Division Companies paid taxes to the State upon the basis of the act of 1865, already referred to, viz., one per cent for the first three years after the completion of thirty miles of road, two per cent for the succeeding seven years, and thereafter, and until their rights passed from them by the foreclosure proceedings, just referred to, at the rate of three per cent of their gross earnings. The Manitoba Company paid this rate at all times during its ownership and operation of the road."

In 1871 the provisions of the state constitution in relation to the taxation of railroad property were extended by an amendment. That amendment was as follows: "Art. 4, sec. 32 (*a*). Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this State, or operating its roads therein, or which may be hereafter organized, shall, in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property, at and during the time and periods therein specified, pay into the treasury of this State a certain percentage therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same

shall take effect or be in force, be submitted to a vote of the people of this State, and be adopted and ratified by a majority of the electors of the State voting at the election at which the same shall be submitted to them." This amendment was submitted to popular vote and approved by the electors. It thereby became, to all intents and purposes, a part of the constitution. Const. Minn., Art. 4, § 32*a*.

After the adoption of that amendment the Legislature passed the above act of 1903, increasing the tax to be paid for 1905 and annually thereafter on the *gross earnings of railroads* operated within the State to *four* per cent. That act was submitted to a vote of the electors and was sustained by the requisite majority.

As already stated, the railway company insists that the territorial act of May 22d, 1857, incorporating the Minnesota and Pacific Railroad Company, constituted a valid and irrepealable contract with that company of which its successors in interest could avail themselves and that its obligation could not be subsequently impaired by any legislative enactment, or by any provision of the state constitution adopted in 1858 after the act of 1857 was passed or as amended in 1871.

We have seen that the (old) Minnesota and Pacific Railroad Company was required, by the territorial act of May 22d, 1857, "in consideration of the grants, privileges and franchises" conferred upon it, to pay annually into the treasury of the Territory or future State *three* per centum of its gross earnings for the preceding year, in lieu of all taxes and assessments whatever, and that, "in consideration of such annual payments," the company should be forever exempt from all assessments and taxes whatever, territorial, state or municipal, upon all its stock, by whomsoever held, and upon all its franchises or estate, real, personal or mixed, and that the land granted by Congress and conveyed to the company under the authority of the State should be exempt from all taxation until sold and conveyed by it.

The Supreme Court of the State expressed doubt whether

the act of 1857 was so worded as to constitute, in itself, a contract that would prevent the Territory or the State from adopting and enforcing any different rule of taxation from that prescribed by that act. We share this doubt of the state court, that act being alone considered, and we are somewhat justified in so doing by the fact that the state Legislature, by the act of 1865, changed the rate of taxation as to this property, then operated by the St. Paul and Pacific Company (a predecessor of the plaintiff), which had undertaken to complete the contemplated railroad and branches. The act of 1865 seems to have been accepted and complied with by the successors in interest of the Minnesota and Pacific Railroad Company, and amounted, as the court below well said, to a practical construction by the parties of the alleged contract of exemption to be found in the territorial act of 1857. But we forbear any direct decision of this question; for there are other grounds upon which our judgment will be based.

The state court recognized the doctrine as firmly established that a legislature, unless restrained by state constitutional provisions, may contract to limit its power of taxation. But it held that, as taxation was essential to the existence and operations of government, an exemption from taxes cannot be presumed from doubtful language but must be expressed in words so clear and explicit as to leave no reasonable doubt that the exemption was intended to be given. And such is the settled rule announced by this court in cases familiar to counsel and too numerous to be cited. Passing without direct decision the question whether the act of 1857 constituted, in itself, an irrepealable contract as between the Territory and the (old) Minnesota and Pacific Railroad Company, the Supreme Court of Minnesota considered the question whether the contract was personal to that particular company, or "did it become attached as an appurtenant to the charter, rights, franchises, and privileges of the company and pass down the line to the defendant." The first clause of that question was answered by the court in the affirmative: the latter in the

negative—the court citing in support of its conclusions the following cases: *Morgan* v. *Louisiana*, 93 U. S. 217; *Gulf &c. Ry. Co.* v. *Miller*, 114 U. S. 176; *Covington Turnpike Co.* v. *Sanford*, 164 U. S. 578; *City of Rochester* v. *Railway Co.*, 182 N. Y. 99; *Memphis Ry. Co.* v. *Com'rs*, 112 U. S. 609. We need not extend the discussion upon that point.

But the state court said, and correctly, that there was another and stronger reason why it should be adjudged that an irrevocable contract did not and could not pass to the companies that claimed to have succeeded to the rights of the Minnesota and Pacific Railroad Company. That reason is suggested by the facts and circumstances now to be stated by us.

The rights, franchises, privileges or immunities of every kind covered by the above territorial act of 1857 were wholly lost to the old Minnesota and Pacific Railroad Company when the State, by its purchase of June 23d, 1860, at the foreclosure sale, became completely reinvested with them. Those rights, franchises, privileges and immunities were swept away from that company by that sale. Now *when that purchase was made* the Territory had become a State, with a constitution expressly requiring the equal and uniform taxation of *all* real and personal property in the State *upon a cash basis* and authorized the exemption from taxation of certain specified kinds of property, devoted to public and charitable uses; but, as we have seen, *railroad property was not included among the properties that could be so exempted*. It is, therefore, to be taken that the Constitution of the State after it went into operation in 1858, required all railroads to be taxed by an equal and uniform rule and on a cash basis. The State having, by its purchase, become reinvested, in 1860, with all the rights, franchises and privileges granted to the Minnesota and Pacific Railroad in 1857 could, speaking generally, have disposed of such interests at will, but, clearly, it could not have disposed of the interests acquired by its purchase, in any manner that was inconsistent with, or which would have rendered nuga-

tory, the requirements or injunctions of the state constitution. Even if the territorial act of 1857, considered alone, might have been regarded as a contract with the State in respect of the amount of the tax to be paid by the railroad company named in it, that contract ceased to have any force, as against the State, when the State in 1860 became, by purchase at foreclosure sale, the owner of all the rights, property, immunities and franchises of the company. The Legislature of the State could not, *after the state constitution went into operation*, have reinvested the old railroad company with such property, rights, immunities or franchises, or have transferred them to a new corporation or to a consolidated railroad corporation created by the union of prior corporations, *accompanied* by an exemption from taxation that was inconsistent with the constitution. Therefore, when by the act of March 8th, 1861, the State released and restored to the Minnesota and Pacific Railroad Company the road, lands, property, rights, franchises, privileges and immunities which had belonged to that company prior to the State's purchase of 1860, there did not go, there could not have gone, with that release or restoration an exemption from taxation that was forbidden by the state constitution then in operation. That instrument stood in the way of such legislation. And, upon like grounds, it must be held that no qualified or partial exemption from taxation could have been acquired by the St. Paul and Pacific Railroad Company under the act of March, 1862, which assumed to pass to that company all the rights, benefits, privileges, property, franchises and interests of the Minnesota and Pacific Railroad Company, which the State had acquired by its second purchase. It was not competent for the Legislature, *after* the state constitution went into operation, to agree, for the State, that the payment of any *given per cent of the gross earnings* of the railroad corporation should be in lieu of all other taxation. The constitution again stood in the way.

Apart from the decision of the Supreme Court of Minnesota in this case the views just expressed are abundantly supported

by adjudged cases. It is well to look at some of those cases, because the question relates to the existence or non-existence of a contract protected as to its obligation by the Constitution of the United States; and upon that question this court must exercise its independent judgment. *Douglas* v. *Kentucky*, 168 U. S. 489, 492, *and authorities there cited.*

In *Trask* v. *Maguire*, 18 Wall. 401, 404, 409, it appeared that a railroad company was incorporated with an exemption from state and county taxes. The corporation obtained a loan from the State. The act under which the loan was made and the bonds given to secure it, provided that the acceptance of such bonds should be a mortgage of the road and every part thereof for the benefit of the State. *Subsequently*, the State adopted a new constitution, which declared that no property, real or personal, should be exempt from taxation, except such as was used exclusively for public schools or belonged to the United States, and also forbade the Legislature to pass any special laws exempting the property of any named person or corporation from taxation. The Legislature passed an act under which proceedings were instituted against defaulting railroad companies to foreclose the State's lien. Pending those proceedings, another act was passed, declaring that any corporation, purchasing at such a foreclosure sale, should have the same power, franchises, rights and privileges and be subject to the same liabilities and restrictions as the corporation whose property and franchises were to be sold. A sale was had and the State became the purchaser of the defaulting railroad and its appurtenances. It was then sold to a private person, who, with his associates, organized a new corporation with the same name as the old one. The question was whether the last corporation was entitled to the immunity from taxation granted to the original company. This court, speaking by Mr. Justice Field, said: "When the State became the purchaser *the immunity ceased;* the property stood in its hands precisely the same as any other unincumbered property of the State, exempt from taxation, not by virtue of any previous

stipulation with the company, but as all property of the State is thus exempt. Subsequently the road and its appurtenances, and all the franchises, which, under the new constitution of Missouri, adopted in 1865, were transferable by the State, were sold by the commissioners to McKay, Vogel, and Simmons, who conveyed the same to Thomas Allen, who with others, in July, 1867, became incorporated under the name of the St. Louis and Iron Mountain Railroad Company. That company is still in existence, and is one of the defendants herein. To it Allen transferred all the rights and privileges acquired from the State. The act under which the sale was made provided that the purchasers of the road should have all the rights, franchises, privileges, and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limitations and conditions therein contained, and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company had possessed, if it were competent for the Legislature *at the time, under the new constitution,* to confer this privilege. The question, therefore, is, whether the Legislature was competent to grant the immunity claimed, under that constitution, which went into operation on the fourth of July, 1865, previous to the passage of any of the acts authorizing the proceedings under which the new company acquired its rights. . . . The inhibition of the constitution applies in all its force *against the renewal of an exemption equally as against its original creation; and this inhibition the Legislature could not disregard in providing for the sale of the property which it had purchased.*"

The *Trask case* was cited with approval in *Morgan* v. *Louisiana,* 93 U. S. 217, 224, and *Louisiana & N. R. R. Co.* v. *Palmes,* 109 U. S. 244, 254.

In the latter case it appeared that at a particular date the Legislature of Florida passed an act that was valid under the existing state constitution, which exempted from taxation the capital stock of railroad companies accepting its provi-

sions. The road, property, franchises and privileges under that act were acquired by a certain railroad company; there was a foreclosure and sale under which the road, property and franchises were ultimately acquired by another railroad company, and the Legislature, by an act, declared that the latter company, as assignees of the original company, should have the same exemption as the old company. But *before the above foreclosure a new state constitution came into operation*, which provided for an uniform and equal rate of taxation, and that the property of corporations, whenever created, should be subject to taxation. This court, speaking by Mr. Justice Matthews, said: "It does not weaken this conclusion to say that the exemption contained in the Internal Improvement Act of 1855 was authorized by the Constitution of the State then in force, which may be admitted, and that it was assignable in its nature or by its terms in such manner that it became impressed upon the property itself, into whosesoever hands it should afterwards come. . . . *After the adoption of the Constitution of Florida of* 1868, there could be no corporation created capable in law of accepting and enjoying such an exemption, for that was prohibited by the constitutional provisions that have been cited. In the case of the Pensacola and Louisville Railroad Company, 1872, the capacity at that time to receive this privilege depended altogether upon the Legislative Act amending its charter to that effect; and if any doubt as to this might be reasonably entertained, certainly none can arise as to the Pensacola Railroad Company, which derived all its powers and its very existence from legislation dependent for its validity wholly upon the Constitution of 1868. The prohibition which forbids the Legislature from exempting the property of railroad corporations from taxation, makes it impossible for the Legislature to create such a corporation capable in law of acquiring and holding property free from liability to taxation."

In *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609, 623, which was a case in which a railroad claimed an exemp-

tion from taxation, enjoyed by its predecessor, this court said: "It is, of course, the law in force *at the time the transaction is consummated and made effectual*, that must be looked to as determining its validity and effect. This is the principle on which this court proceeded in deciding the case of *Railroad Co.* v. *Georgia*, 98 U. S. 359. The franchise *to be a corporation* remained in, and was exercised by, the old corporation, notwithstanding the mortgage of its charter, until the new corporation was formed and organized; it was then surrendered to the State, and by a new grant then made passed to the corporators of the new corporation, and was held and exercised by them under the constitutional restrictions then existing. Our conclusions, then, are, that the exemption from taxation contained in the 28th section of the act of January 11, 1853, was intended to apply only to the Memphis and Little Rock Railroad Company as the original corporation organized under it; that it did not pass by the mortgage of its charter and works, as included in the transfer of the franchise to be a corporation, to the mortgagees or purchasers at the judicial sale; that the franchises embraced in that conveyance were limited to those which had been granted as appropriate to the construction, maintenance, operation, and use of the railroad as a public highway and the right to make profit therefrom; and that the appellant, not having become a corporate body *until after the restrictions in the Constitution of* 1874 *took effect*, was thereby incapable in law of having or enjoying the privilege of holding its property exempt from taxation." That case was referred to with approval in *Mercantile Bank* v. *Tennessee*, 161 U. S. 161, where it was held that a sale of a corporate charter and franchises transferred to the purchaser only the right to reorganize as a corporation, "subject to the laws, constitutional and otherwise, existing at the time of the organization."

A case in point is *Keokuk & Western Railroad Company* v. *Missouri*, 152 U. S. 301, 312. Under the authority of a legislative enactment, passed in 1869, a Missouri corporation was consolidated in 1870 with an Iowa corporation, created in

1857, and the charter of which contained an exemption of its stock from taxation for a specified period. The consolidated road was sold in 1886 under a decree of foreclosure of a mortgage given by the Iowa corporation and conveyed to the Keokuk and Western Railroad Company. The latter company claimed the benefit of the exemption contained in the charter of the company created in 1857. *Between that date and the passage of the act of* 1869 *a new state constitution was adopted*, and it provided that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State." After considering the general question whether an immunity from taxation passed to the purchaser of the franchises, rights, and privileges of a railroad company under a foreclosure of a mortgage, the court said: "But the decisive answer to this objection is that the Legislature had no power, in 1869, to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857, before the constitution was adopted, and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, *it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of* 1869."

In *Yazoo & Miss. Valley Ry. Co.* v. *Adams*, 180 U. S. 1, 23, which related to an exemption from taxation claimed by a company consolidated in 1892 by the union of companies organized in 1882, and which consolidation was held to create a new corporation, this court said: "But it is scarcely necessary

to say that, if the consolidation of 1892 resulted in a new corporation, it would come into existence under the constitution of 1890, with the disabilities attaching thereto, among which is the provision that 'the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals.' Even if the Legislature, in these several acts of consolidation, had expressly provided that the new corporation thereby formed should be exempted from taxation, the higher law of the constitution would be interpreted as nullifying it to that extent. A similar remark may be made with regard to the provision that these companies might consolidate upon such terms as they should agree upon. Obviously such terms must be consistent with the law existing *at the time of the consolidation*. . . . Under no circumstances would they be interpreted as conveying rights to the new corporation which the Legislature was incompetent to confer."

In *Rochester Ry. Co.* v. *Rochester*, 205 U. S. 236, 254, 255, it was held, in respect to a legislative enactment assuming to transfer to a particular corporation an exemption granted to a former corporation, the court, after a full reference to the adjudged cases, held: "No corporation can receive by transfer from another an exemption from taxation or governmental regulation which is inconsistent with its own charter *or* with the constitution or laws of the State then applicable, and this is true, even though, under legislative authority, the exemption is transferred by words which clearly include it;" that "those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws *then in force*, whether in the constitution, in general laws or in the charter itself."

The recent case of *Yazoo & Miss. Valley R. R. Co.* v. *Vicksburg*, 209 U. S. 358, 364, 365, was the case of a consolidated corporation claiming the benefit of an exemption legally given to its predecessor before the adoption of a state constitution prohibiting the exemption of corporate property

from taxation. This court said: "The exemption to the former constituent company could not inure to the consolidated company without, in effect, ignoring the constitutional provision. . . . The formation of the consolidated company was not imposed upon the complainant; it had the privilege of standing upon such rights as it had by contract or otherwise under the former legislation in force before the adoption of the new constitution. When it saw fit to enter into the consolidation and form a new corporation in 1892 the constitution *then in force* in the State became the law of its corporate being, and the requirement that corporate property should not be exempt from taxation then became binding upon it, as upon all other corporations formed under the new organic law."

In view of the adjudged cases it would seem clear that after the Minnesota constitution went into operation in 1858 the Legislature could not, by legislation or otherwise, enter into a binding contract for a complete or partial exemption, either in favor of the corporation originally created by the Territory in 1857, or in favor of a new railroad corporation or of one created by the consolidation of old corporations. It must have been controlled by the fundamental law of the State. So the highest court of Minnesota has held in this case. And so we hold. It follows that legislative acts, relating to the property and railroads here in question, and passed after the state constitution took effect, which proceeded, in the matter of taxation on grounds of taxation different from those established by that instrument, were ineffectual.

We have not deemed it necessary in this discussion to refer in detail to the numerous cases in the Supreme Court of the State which have been cited by counsel. This course has been pursued for two reasons: 1. The state court, in its opinion in the present case, said: "That the question here presented, viz., whether the provisions of the Minnesota and Pacific Company's charter on the subject of the earnings tax constituted an irrevocable contract was not involved in any prior litigation be-

tween the State and the railroad company, and as what was said in the previous cases bearing upon the question was wholly unnecessary to the decision of the particular case, and therefore not of binding force or effect, we take up and dispose of the present case as though the question were, as it is, here for the first time." We accept that view of the state court as to the scope of its own decisions. 2. The question just stated—the question of the existence or non-existence of a binding contract with the State—is one peculiarly for the final determination of this court. The authorities heretofore cited by us show that upon an issue of that kind this court must, upon its own responsibility and independent judgment, determine the legal rights of the parties under the clause of the Federal Constitution protecting the obligation of contracts against being impaired by state legislation.

In the present case it is gratifying that there is a concurrence of views between this court and the state court upon the question whether the plaintiff in error, the Great Northern Railway Company, described by the state court as the "successor in interest of all the prior companies," was entitled, as upon contract, to claim the benefit of the three per centum gross earnings tax provision in the act of 1857. And this seems to be a determination of the only question of a Federal nature arising on this writ of error and which should be now decided; for, if the contention of the railroad company as to that question be overruled—as both this court and the state court agree that it must be—it would only remain to inquire whether the act of 1903, prescribing a four per centum gross earnings tax, was authorized by the state constitution, as amended in 1871. The Supreme Court of the State adjudges that it was so authorized, but that is a state or local question upon which this court need not express its opinion. It is true that one of the assignments of error before the state court was that the act of 1903 was inconsistent with the due process clause of the Federal Constitution. But the suggestion was not much pressed in argument; and it cannot, under the evi-

dence before us in this case, be assumed that the rate prescribed by the act of 1903 is confiscatory either in its nature or in its necessary operation. If, when the act of 1903 was passed, the State was not fettered by inviolable contracts in respect of the taxation of the gross earnings of railroad property, there was nothing to prevent the Legislature, instructed by a popular vote, from prescribing an uniform gross earnings tax for all railroad property operated in the State. There being no adequate proof showing the contrary, the rate prescribed by that act must be taken as being within the power of the Legislature to establish and not as being confiscatory. There is absolutely nothing in the record that would justify the conclusion that the rate fixed by the act of 1903 was confiscatory in its nature, that is, wanting in the due process of law enjoined by the Constitution.

One other matter deserves notice. Some reference was made at the argument to *Stearns* v. *Minnesota*, 179 U. S. 223, 230, 240, 253. There is nothing in the judgment in that case which at all conflicts with or controls the decision in this case. That case involved only the question whether certain *lands* owned by the defendant railroad companies, but which were not used in the operation of their roads in the State, were subject to taxation according to their value or were exempted from ordinary rule of taxation by virtue of statutes, like that of 1857, passed after the state constitution took effect. A similar question was adverted to in the present case and the state Supreme Court, referring to the charter of the Minnesota and Pacific Railroad Company, said: "Two distinct provisions on the subject of taxation were embodied therein, the first providing for a gross earnings tax in lieu of all other taxes and assessments, and second, an exemption of the *land* granted until sold or contracted to be sold by the company." Observing that the exemption in question did not pass as an appurtenant to the railroad properties in question and was not included within the expression 'rights, privileges, and immunities'—citing *Gulf &c. Ry. Co.* v. *Hewes*, 183 U. S. 66;

C. & O. Ry. Co. v. *Miller*, 114 U. S. 176; *Lake* v. *Drummond*, 49 S. E. Rep. 506; *Rochester* v. *Ry. Co.*, 182 N. Y. 99; *Covington Turnpike Co.* v. *Sandford*, 164 U. S. 578—the court said: "A distinction must not be overlooked when considering the assignability of a tax exemption between those imposing a commuted system in lieu of property taxes, and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land, granted to a railroad company to aid in the construction of a railroad company, is specifically exempted from taxation until sold by the company, and the company accepts, in consideration of the exemption, the exemption attaches to and follows the land. *New Jersey* v. *Wilson*, 7 Cranch, 164; *State* v. *Hicks*, 30 Am. Dec. 423; *Ry. Co.* v. *State*, 75 Texas, 356. In such case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it." In the *Stearns case* the court determined only the question whether the *lands* of the railroad company were taxable. It held, upon the showing there made, that there was a valid contract with the railroad companies in respect to the taxation of the lands there in question which it was beyond the power of the State to impair by legislation. Nothing beyond that was actually adjudged in the *Stearns case*. No such question arises in the present case. There is no attempt here to tax the *lands* granted by the territorial act of 1857 or by any other act.

The State sues only for the balance due to it on account of taxes imposed by the act of 1903 on the *gross earnings* of property used and operated within its limits for railroad purposes.

Perceiving no error in the record as to the Federal question involved, the judgment must be affirmed.

It is so ordered.